(10) 04-8996

No.

In the Supreme Court of the United States

PAUL GREGORY HOUSE,
Petitioner,

v.

RICKY BELL, Warden,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Counsel of record for Petitioner

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner Paul House's compelling new evidence of innocence sharply split the full *en banc* Sixth Circuit Court of Appeal. A bare majority of eight judges determined that he presented a colorable claim of innocence, but not a sufficiently strong one that allowed either for review of his underlying constitutional claims pursuant to *Schlup v. Delo*, 513 U.S. 298 (1995) or his free-standing innocence claim pursuant to *Herrera v. Collins*, 503 U.S. 390 (1993). Six dissenters determined that House's new evidence of innocence was so persuasive and compelling that it easily satisfied *Schlup*, met Justice White's demanding innocence standard in *Herrera*, and warranted his immediate release from prison. The seventh dissenter argued that the new evidence was sufficient to warrant habeas relief and a new trial where a jury could consider all the evidence. Two questions arise from this outcome that warrant this Court's review:

1. Did the majority below err in applying this Court's decision in *Schlup v. Delo* to hold that Petitioner's compelling new evidence, though presenting at the very least a colorable claim of actual innocence, was as a matter of law insufficient to excuse his failure to present that evidence before the state courts – merely because he had failed to negate each and every item of circumstantial evidence that had been offered against him at the original trial?

2. What constitutes a "truly persuasive showing of actual innocence" pursuant to *Herrera v. Collins* sufficient to warrant freestanding habeas relief?

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OPINIONS BELOW

The *en banc* opinion of the court of appeals (App. 1) that is the subject of this petition is published at 386 F.3d 668. The earlier *en banc* opinion (App. 47) is reported at 311 F.3d 767. The panel opinion (App. 66) is reported at 283 F.3d 737. The memorandum opinion of the district court (App. 86) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2004. No further rehearing was sought. Mr. Justice Stevens extended the time for filing a petition for writ of certiorari to and including March 5, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Article I, Section 9, clause [2] states, in relevant part: "The privilege of the Writ of Habeas Corpus shall not be suspended.."

The Fourteenth Amendment to the United States Constitution states, in relevant part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

STATEMENT OF THE CASE

Introduction

Powerful new evidence of innocence, including DNA evidence, proves that petitioner Paul House was wrongly convicted of the murder of his former neighbor, Carolyn Muncey. Yet he remains on death row, having been denied review of his underlying meritorious constitutional claims by the barest possible majority of an *en banc* Court of Appeals, which did so only by misapplication of this Court's decisions in *Schlup v. Delo* and *Herrera v. Collins*.

In 1986, the district attorney general of rural Union County, Tennessee, successfully argued to twelve of that county's residents that Paul Gregory House brutally beat Carolyn Muncey to death after luring her to a remote area near her home and attempting to sexually assault her. The prosecution argued that Mr. House's semen was found on the underwear and nightgown of the murder victim, Carolyn Muncey; that blood shed from Mrs. Muncey's body during the murder was found on Mr. House's blue jeans; that Mr. House was seen a day later surveying the location where Ms. Muncey's body was found; that Mr. House did not tell law enforcement about a one hour and fifteen minute absence from his girlfriend's trailer that night; and that Mr. House shared a "low voice" with a person who had spoken to Carolyn Muncey sometime on the evening she was killed. That evidence, the prosecution argued, proved beyond a reasonable doubt that on the night of July 13, 1985, Paul Gregory House murdered his neighbor, a young housewife and mother of two, in the course of sexually assaulting her.

When those twelve men and women returned from deliberations convinced of Mr.

House's guilt, however, not one of them knew that the frailty – and more often than not, outright falsity – of virtually every significant piece of evidence presented to them. Not one juror knew that modern DNA testing would positively *exclude* Mr. House as the source of the damning semen stains on Ms. Muncey's clothing. None of them heard the Assistant Chief Medical Examiner of the State of Tennessee, Dr. Cleland Blake – a man who himself had put more than his share of men on Tennessee's death row and in its prisons – testify unequivocally and without hesitation that the blood stains on Mr. House's jeans came from blood originally contained in the four sample tubes collected during Ms. Muncey's autopsy, and not from the blows which caused her death. The jurors did not hear the un-controverted testimony or see the indisputable photographic evidence showing that at least three-fourths of the contents of one of these samples tubes was missing and could not be accounted for – providing powerful support for Dr. Blake's scientific opinion that the blood on the jeans was actually spilled from those tubes long after her death. They did not see the aerial photographs proving conclusively that the only place Mr. House was seen the day after the murder was walking toward the Muncey home trying to assist the victim's husband in the search for his missing wife.

Nor did a single person emerging from that jury room hear about the powerful evidence now uncovered which points convincingly to the victim's abusive husband, Herbert Muncey Jr., as the true perpetrator. The jurors did not hear about Mr. Muncey's long history of beating his wife or his recent threats to "get rid of her one way or another," how he had lied to law enforcement about never seeing his wife after he left home on the morning she was murdered, and tried to fabricate an alibi for himself the night she was killed, or how an eyewitness saw him hit his wife again only hours before her death. Nor did the jurors know about his tearful

confessions to two of his friends - witnesses with no motive whatsoever to falsely implicate him -- that he had, in fact, later that same night committed the murder for which Paul Gregory House remains on death row. In short, the jury did not hear the truth.

Now, almost two decades later, Paul Gregrory House, an innocent man, cleared by DNA evidence, other exculpatory scientific evidence, indisputable physical evidence, and multiple eyewitness accounts, waits in a prison just outside of Nashville, Tennessee for a jury to hear the evidence in its entirety. He remains there despite the fact that eight Judges of the United States Court of Appeals for the Sixth Circuit, all of whom agree that Mr. House has established a "colorable claim of actual innocence," misinterpreted this Court's precedents to demand that he "do more" before they will even consider the patent constitutional violations which led to this manifest injustice. He remains on death row despite the fact that the six remaining Judges of that same court -- having themselves been wholly convinced of Mr. House's actual innocence -- logically concluded that no rational juror could ever vote to convict him of capital murder beyond a reasonable doubt, and called for his immediate release. And he remains on death row despite the fact that a seventh Circuit Judge concluded that, at the very least, the case poses a genuine "mystery" requiring a new trial by jury. Because this Court's precedents clearly provide an avenue of relief to a habeas Petitioner who offers such a compelling showing of actual innocence, yet the Circuits are both split and confused as to the standards they must apply in such cases, this Court should grant the Writ.

State Court Proceedings: The crime and its investigation

This case arises from Union County, a small rural community in east Tennessee, and concerns the beating death of Carolyn Muncey, the mother of two children, and wife of Hubert

Muncey, Jr. While suspicion might normally have been cast toward Mr. Muncey because of his reputation in the community for beating his wife, the police investigation focused solely and almost immediately on Petitioner Paul Gregory House, a convicted sex offender who had recently moved to Union County, after a witness claimed to have seen Mr. House on the day following the murder coming up from an embankment near the Muncey home where Ms. Muncey's body was later found. No other suspect, including Mr. Muncey, was ever investigated. Law enforcement collected blood and saliva samples from Mr. House, as well as a pair of muddy blue jeans which were recovered from a laundry hamper in the trailer home of House's girlfriend. These items, together with a sealed Styrofoam box containing four sample tubes of Carolyn Muncey's blood and a vaginal swab taken during her autopsy, and various articles of Ms. Muncey's clothing were placed in a large cardboard box and turned over to Joe Ed Munsey and William Breeding, two local law enforcement agents, who were charged with transporting it by car to the FBI Crime Laboratory near Washington, D.C. After learning that there were blood stains on Mr. House's blue jeans which were consistent with the blood of Carolyn Muncey, the State of Tennessee charged Paul Gregory House with first degree murder.

State Court Proceedings: The trial

The State's case against Mr. House was purely circumstantial. The prosecution had no confession; indeed, Mr. House steadfastly denied killing Ms. Muncey. It had no eyewitnesses. And it had no obvious motive: Mr. House had only recently moved to Union County, and while he had met Ms. Muncey, there was no evidence that he either disliked her or wanted more than a friendship with her.

The prosecution built its case for capital murder around several circumstances, each of

which tended either to place House with the victim on the evening of the crime or impeach his alibi. First, it asked the jury to believe that Billy Ray Hensley's testimony – that he saw House climbing up the embankment very near to where Ms. Muncey's body was found – showed the House was guilty because he, and no one else, knew where her body was located. Further, it asked the jury to conclude that the black rag that Hensley testified he saw House clutching when he first saw him was in fact the blue shirt that he was wearing at the time of the crime, and that House had returned to Ms. Muncey's body to retrieve it so he could not be linked to the crime.

Second, the prosecution asked the jury to find that the stains that appeared on House's pants that were recovered from Donna Turner's clothes bin were Ms. Muncey's blood, *and* that the pants became stained *during* House's struggle to bludgeon and strangle Ms. Muncey. It presented expert testimony from an FBI special agent that informed the jury that lab testing showed that the blood on the pants very likely was Ms. Muncey's blood.

Third, the prosecution presented evidence that the semen stains found on Ms. Muncey's clothing was left by a secretor with House's blood type, and that House was a secretor. This biological evidence also provided a damning, and indeed the only plausible, motive for the crime, *i.e.*, House murdered the victim either to conceal a sexual assault, or in an attempt to force the victim's acquiescence. Moreover, it was the only evidence of sexual assault or even attempted sexual assault which did not require the jury to first assume Mr. House's guilt.

Finally, the prosecution presented evidence that showed that House had lied to law enforcement officials and urged his girlfriend, Donna Turner, to lie about whether House had left the trailer on Saturday evening. It asked the jury to conclude that House had misled the police so they would not find the incriminating pants or place him where he had no alibi.

The defense countered that Mr. House did not commit the crime and that the evidence pointed more truly toward Hubert Muncey. Donna Turner testified that House did not leave the trailer until 10:30 or 10:45. This would have left House insufficient time to travel on foot the nearly two miles to the Muncey home and abduct Ms. Muncey before the Muncey children awoke and walked to their neighbor's home by 11:00. The State's forensic evidence placed the time of death between 9:00 and 11:00 pm. Further the defense attempted to show that Billy Ray Hensley did not see House climbing up the embankment where Ms. Muncey's body was later found and that he actually saw Mr. House on the roadway where Mr. House had admitted to being and where another witness also saw Mr. House.. It was unable to address the State's blood on pants or semen stain evidence, except to argue that the prosecution was negligent not to have tested to see if the semen could be linked to Mr. Muncey. It further argued that because the prosecution failed to satisfy its special burden in a circumstantial evidence case under Tennessee law , *i.e.* it must establish beyond a reasonable doubt that the evidence is consistent with only a hypothesis of guilt, the jury was required to acquit Mr. House.

After deliberations, the jury found Mr. House guilty of capital murder. At the conclusion of the sentencing phase of trial, the jury determined that Mr. House had committed the murder during the course of a rape, attempted rape, or kidnapping, and found two additional statutory aggravating circumstances. The jury sentenced Mr. House to death. The Tennessee Supreme Court affirmed Mr. House's conviction and sentence. *House v. State*, 743 S.W.2d 141 (Tenn. 1987), *House I*.

State Post-Conviction Proceedings

On February 25, 1988, Mr House filed a *pro se* state post-conviction motion asserting,

inter alia, his trial counsel's failure to properly investigate and prepare for the guilt phase of his capital trial and that the State had failed to reveal exculpatory evidence. Counsel was appointed for Mr. House. On August 25, 1988, the day set for hearing on Mr. House's motion, counsel filed an amended petition containing only two jury instruction claims and deleting Mr. House's *pro se* claims. At the hearing, counsel presented no evidence whatsoever and argued only the jury instruction claims. Mr. House made no on-the-record statement that he agreed to waive his guilt phase ineffective assistance of counsel claim. The court dismissed that claim, and also summarily dismissed the jury instruction claims on the grounds that they should have been presented on direct appeal. The decision was affirmed by the Tennessee appellate courts. Certiorari review was denied by this Court. 498 U.S. 912 (1990).

On December 14, 1990, Mr. House, who was by then represented by undersigned's co-counsel in the district court below, filed a second petition for post-conviction relief, challenging not only trial counsel's ineffectiveness, but prior post-conviction counsel ineffectiveness for withdrawing that claim. In response, the State asserted the claims were procedurally defaulted. The State submitted that, because of counsel's prior withdrawal of Mr. House's claim of ineffective assistance of counsel, the petition should be dismissed. The court agreed as did the Tennessee Court of Criminal Appeals. The Tennessee Supreme Court vacated the lower appellate court's decision and remanded it for consideration in light of a new decision. The Court of Criminal Appeals then reversed its prior holding and ordered that Mr. House's case be returned to the trial court to determine whether Mr. House had deliberately and personally waived his ineffective assistance of trial counsel claim during his first post-conviction proceeding. *House v. State*, 1993 WL 97546 (Tenn. Crim.App.) The State then sought review in the Tennessee

Supreme Court. In a decision specifically overruling prior authority which required a personal waiver, the Supreme Court reversed the decision of the Court of Criminal Appeals and affirmed the trial court's dismissal of Mr. House's second petition for post-conviction relief. *House v. State*, 911 S.W.2d 705 (Tenn. 1995), *House II*. This Court denied certiorari review. 517 U.S. 1193 (1996)

Federal Habeas Corpus Proceedings

Mr. House filed a timely petition pursuant 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Tennessee, asserting claims of, *inter alia*, ineffective assistance of counsel and suppression of material exculpatory evidence. Respondent Bell asserted that consideration of these claims was procedurally barred. Mr. House responded that any such bar was inadequate and that based upon the facts alleged, he was entitled to an evidentiary hearing to demonstrate that he was actually innocent and that his claims could nonetheless be considered under the substantial miscarriage of justice exception. The district court determined that the *House II* court's default holding was an independent and adequate state ground for dismissal of the ineffective assistance of counsel and *Brady/Giglio* claims and ordered an evidentiary hearing to determine whether Mr. House could meet the "miscarriage of justice" exception by demonstrating his "actual innocence" as set forth in *Schlup v. Delo*, 513 U.S. 298 (1995).

The District Court Hearing Evidence

Petitioner House presented substantial credible evidence that showed that *each* of the principal pieces of circumstantial evidence relied upon by the jury to convict was either entirely unreliable or strongly suggested that Carolyn Muncey's killer was her husband, Hubert Muncey. The evidence also showed that the State of Tennessee knew, yet failed to reveal, and sometimes

overtly misrepresented, many of these facts.

First, he presented DNA evidence that conclusively established that the semen stains found on Ms. Muncey's clothing were not, as the prosecution urged the jury to conclude, Mr. House's. Apx 800. In fact, the semen stains (upon which the prosecution relied totally to provide an even remotely believable explanation what would motivate Mr. House to walk or run almost two miles, at a rapid rate of speed, up and down the hills of East Tennessee, in the middle of a moonless night) were those of her husband, Hubert Muncey Jr.[1] This new evidence itself raises a colorable showing of innocence. At trial, the defense claimed innocence, asserted that Mr. House had no motive to harm Ms. Muncey, and argued that Mr. Muncey was the likely assailant. This new evidence strongly bolsters Mr. House's trial defense and shows the prosecution's urging the jury to conclude that House was driven by lust to commit the crime was entirely misleading and highly prejudicial.

Second, he presented evidence that Hensley could not have seen House coming up the embankment from the area where Ms. Muncey's body was found as Mr. Hensley had originally claimed. Photographs taken near the time of trial as well as aerial photographs taken during federal proceedings showed that it was physically impossible for Mr. Hensley to have seen Mr. House from his claimed vantage point, much less to have seen him coming up from the embankment, leaving the only credible evidence that of the witness who testified that he had seen a man fitting House's description walking from his car toward the Muncey home.[2]

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[1] Also introduced at the hearing was a TBI report which showed that Muncey had told law enforcement that he and his wife had had sexual relations on the morning of the crime. This report was not disclosed to the defense prior to or during the trial.

[2] At trial, the prosecutor tried to obfuscate this fact by telling the jury, "[p]hotographs, which we all now, only go so far in showing you the truth - photographs distort distance, and they distort angles, we all know that."

Third, House presented considerable lay and expert evidence to establish that the blood on his pants that the jury was urged to conclude was transferred from Ms. Muncey at the time of the crime was in fact transferred *after* the pants were in the possession of law enforcement. This evidence came from several sources. The most notable of these was the testimony of Dr. Cleland Blake, the Assistant Chief Medical Examiner for the State of Tennessee, a man who had not only previously testified almost exclusively for the prosecution in criminal cases, but had also trained Tennessee law enforcement agents regarding the proper handling of biological evidence. Dr. Blake testified unequivocally that he had determined that because of the similarity of the degradation of the blood stains on Mr. House's blue jeans and that of the blood taken from the sample tubes, the blood stains on Mr. House's blue jeans did not come from the transfer of blood during the crime but from the transfer of blood from the sample tubes taken during Carolyn Muncey's body. Dr. Blake's testimony was partially corroborated by the State's own serology expert, who conceded the soundness of the basic scientific principles upon which Dr. Blake relied.[3] It was further corroborated by, *inter alia*, indisputable photographic and documentary evidence that blood was inexplicably missing from the sample tubes and that this blood had escaped prior to their receipt by the FBI Crime Laboratory and that the Styrofoam box containing the sample tubes was opened during transit to the FBI.

Fourth, House presented evidence from local law enforcement personnel and long time friends of Hubert Muncey, Jr., the victim's violent and abusive husband, that showed that he, not Mr. House, murdered Carolyn Muncey on the night of Saturday, July 13, 1985. Evidence that

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[3]The State's expert disagreed with Dr. Blake's ultimate conclusion because, while he admitted that these similarities might be significant, he opined that they might also have been the result of simple coincidence.

Hubert Muncey Jr., unlike Mr. House, had the motive and opportunity to kill his wife, and that he actually confessed to having done so.

This evidence showed that Hubert Muncey was known in the community to be a severe alcoholic and wife abuser. Not only had a number of people seen Mr. Muncey strike the victim, she had also been seen a number of times with bruises from a beating to her face and head. A few months before her murder, Mr. Muncey told his friend, Hazel Miller, that he had been in an argument with his wife and was going to get rid of her "one way or the other."

On the evening of the crime, Ms. Muncey was seen with Mr. Muncey outside of the C & C Recreation Center. They argued and a witness saw Mr. Muncey strike her. Ms. Muncey left, alone and on foot. The next morning, Mr. Muncey went to the home of Ms. Artie Lawson. He asked her to say that she had seen him at the dance the night before. This was untrue and Ms. Lawson refused to do what Mr. Muncey had requested. Mary Atkins, the same person who had seen Mr. Muncey hit his wife the night before, was staying nearby at her brother's house and saw Mr. Muncey at Ms. Lawson's house that morning.

Some time before Mr. House's trial, Muncey stopped by the home of a former girlfriend, Kathy Parker. Ms. Parker was there, along with some friends, having a few beers. Also present was her sister, Penny Letner, who was not drinking. Mr. Muncey had been drinking. He had been at the house for a few minutes when he sat down on the couch and started crying. Ms. Parker, who had been drinking herself, recalled that Mr. Muncey said that he had got into an argument with his wife, that he slapped her, that she fell and hit her head, and that he didn't mean to do it. Ms. Letner, who had not been drinking, remembered more of the details of his confession:

> He said that he didn't mean to do it. That she was "bitching him out" because he didn't

take her fishing that night, that he went to the dance instead. He said when he came home that she was still pretty heavily "bitching him out" again and that he smacked her and that she fell and hit her head. He said he didn't mean to do it, but I had to get rid of her, because I didn't want to be charged with murder.

Ms. Letner stated that she was upset by Mr. Muncey's confession and that she left immediately. Ms. Parker testified that she too was upset and "run [Mr. Muncey] off". Ms. Letner stated that she was a nineteen year old mother at this time and that she was too scared to come forward (Letner habeas hearing testimony). However, Ms. Parker testified that she soon thereafter attempted to tell law enforcement about what she and Ms. Letner had heard, but that they did not appear interested. (Parker habeas hearing testimony 2/1/99, p. 38-39)

In his testimony, Mr. Muncey denied that he was often abusive to his wife; he denied the physical encounter he had with his wife at the C & C Recreation Center; he denied that he killed her; he denied that he asked Ms. Lawson to lie (or that he was even at Ms. Lawson's home the morning following his wife's murder); and he denied that he confessed to Ms. Letner and Ms. Parker. He could not explain why so many people who considered themselves his friends would come into federal court and testify to the contrary.

The District Court ruling

The district court dismissed the petition. Conflating principles announced in *Herrera v. Collins*, 506 U.S. 390 (1993) and *Schlup v. Delo*, 513 U.S. 298 (1995), the court determined that the new evidence did not establish that Mr. House was actually innocent. While the court heard from numerous witnesses, it made few credibility determinations.

The Court of Appeals rulings

The United States Court of Appeals for the Sixth Circuit issued two published *en banc*

decisions in this matter.[4] In each, court members were sharply divided not only on the legal standards that govern this proceeding but on the significance of the new facts to those principles.

In *House v. Bell*, 311 F.3d 767 (6th Cir. 2002)(*en banc*), a six-judge majority concluded that the new evidence created "a serious question or doubt that the defendant is guilty of first degree murder," 311 F.3d at 777, and certified questions to the Supreme Court of Tennessee to facilitate review. *Id.*[5] Judge Gilman issued a dissenting opinion stating that he considered the certified questions unnecessary but would grant sentencing phase relief on the basis of the then-current record. Four other judges also dissented. While conceding that the evidence, "might convince some, or even most, reasonable jurors that Paul House is actually innocent or should not be convicted." *House v. Bell*, 311 F.3d at 780 (Boggs, J., dissenting)(emphasis supplied), these judges believed that Mr. House had failed to meet the requirements of *Schlup* because, in their opinion, *Schlup* allowed them to reach the merits of Mr. House's claims only "if a judge can conscientiously assert that every reasonable juror is almost certain to vote to acquit." *House v. Bell*, 311 F.3d at 783

(Boggs, J., dissenting)(emphasis supplied) Mr. Bell petitioned this Court for certiorari review, which was denied.

At the urging of the State, the Tennessee Supreme Court departed from years of prior practice and refused to answer the certified questions and the matter was returned to the Sixth Circuit Court of Appeals. Thereafter, on October 6, 2004, the Sixth Circuit issued a new opinion

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[4] An initial panel opinion denying relief, *House v. Bell*, 283 F.3d 737 (6th Cir. 2002), was vacated when the majority agreed to hear the case *en banc*.

[5] Those questions inquired whether state avenues were available to present guilt phase claims of constitutional error to a defendant who has demonstrated his actual innocence, under what combination of constitutional errors a defendant ceases to become death eligible under Tennessee law, and whether Tennessee law provided a state remedy for a person whose lack of eligibility for the death penalty was demonstrated through newly discovered evidence.

affirming the district court's denial of relief. *House v. Bell*, 386 F.3d. 668 (2004)(*en banc*). The eight-judge majority agreed that Mr. House had established a colorable claim of innocence, *House v. Bell*, 386 F.3d at 684, but nonetheless denied relief because it determined that *Schlup* required Mr. House to do more. *Id.* It found that sufficient evidence of guilt remained unaffected by the new evidence to adequately support his conviction. 386 F.3d at 685.

Six judges dissented. They concluded that House's new evidence not only was sufficient to satisfy the *Schlup* gateway standard and thus permit review of House's underlying constitutional claims, they found the evidence presented that rare and extraordinary case where petitioner has provided "a truly persuasive demonstration of 'actual innocence' " which met Justice White's concurring opinion in *Herrera* to establish his innocence of the crime. 386 F.3d at 708-09. Judge Gilman again dissented alone, and wrote that the new evidence "left him in grave doubt as to which of the . . . two suspects murdered Carolyn Muncey." 386 F.3d at 709. He believed that the evidence was sufficient to satisfy *Schlup* and determined that the proper resolution was to grant the writ so that "a new trial would allow a jury to assess House's guilt or innocence free from erroneous introduction of semen evidence, the full knowledge of the controversy surrounding the blood evidence, and with the benefit of the testimony implicating Hubert Muncey." 386 F.3d at 710.

REASONS FOR GRANTING THE WRIT

In the twelve years since this Court decided *Herrera v. Collins*, 506 U.S. 390 (and the decade since it decided *Schlup v. Delo*, 513 U.S. 298 (1995), we have learned a great deal about the fallibility of our system of justice. As a result of increasingly sophisticated forensic tests, exonerations of people charged with or convicted of serious crimes are no longer rare events.[6]

[6] *See* Samuel R. Gross, et al., *Exonerations in the United States 1989 Through 2003* at 1 (2004)("The rate of exonerations increased sharply over the 15-year period of the study, from about 12 a

Staunch supporters of capital punishment have acknowledged that the alarming number of exonerated death row inmates has given them pause about the application of the ultimate penalty.[7] Late last year, in recognition of the need to prevent and expose wrongful convictions, a bill designed to facilitate access to DNA testing and improve defense representation enjoyed broad bi-partisan support and was enacted by Congress.[8] In his latest State of the Union Address, President Bush extolled the paramount importance of protecting against wrongful convictions.[9]

Paul House presents a compelling case of actual innocence. He has demonstrated that all the physical evidence linking him to the crime for which he has spent the last twenty years on death row was either non-existent or patently unreasonable. He has shown that the purely circumstantial case against him, consisting primarily of the statement of Billy Ray Hensley, is wholly implausible. And he has presented testimony that Mrs. Muncey's husband has confessed to killing her. Nine federal court of appeals judges believe that Mr. House has raised serious doubts about his guilt. *See House*, 386 F.3d at 684, 710. Six more believe that he has proven that he is innocent. *See House*, 386 F.3d at 708. House urges this Court to grant certiorari in his case. Doing so will permit the Court to clarify its holdings in *Schlup* and *Herrera* and elaborate on the standards by which lower courts

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year through the early 1990s to an average of 43 a year after 2000.").

[7] *See* George F. Will, *Innocent on Death Row*, Washington Post, April 4, 2000; Del. Vincent F. Callahan, Jr., "Virginia Needs A Moratorium On The Death Penalty" The Roanoke Times, Jan. 31, 2002 ("In the past, I have been a strong advocate of the death penalty. However, I have now become one of those who believe that we must take another look at the death penalty. New scientific evidence, such as DNA evidence, has revolutionized all areas of crime detection, criminal prosecution and criminal defense.").

[8] *See* Peter Baker, *Behind Bush's Bid To Save The Innocent*, Washington Post, A09 (Feb. 4, 2005); *see* Bill No. H.R. 3214/S 1700 (Advancing Justice Through DNA Act)(sponsored by Rep. F. James Sensenbrenner and Sen. Orrin Hatch).

[9] *See* Baker, *supra* (quoting Pres. Bush in his State of the Union Address of Feb. 2, 2005: "Because one of the main sources of our national unity is our belief in equal justice, we need to make sure Americans of all races and backgrounds have confidence in the system that provides justice. In America, we must make doubly sure no person is held to account for a crime he or she did not commit.").

should consider claims of actual innocence. A survey of circuit decisions applying *Herrera* and *Schlup* reveals inconsistency and confusion among lower courts about how to use those cases to consider post-conviction claims of actual innocence. The need for this clarification cannot be overemphasized in this era since DNA and other exonerations have shined the light on a "catalog of appalling miscarriages of justice."[10]

I. THE CIRCUITS REQUIRE GUIDANCE ABOUT HOW TO APPLY *SCHLUP* IN CASES LIKE HOUSE'S IN WHICH POST-CONVICTION INVESTIGATION UNCOVERS CREDIBLE EVIDENCE OF ACTUAL INNOCENCE AND RADICALLY UNDERMINES THE CASE PRESENTED TO THE TRIAL JURY.

The sharply divergent approaches of the Sixth Circuit majority and dissenting opinions in House's case reveal a schism that cleaves *Schlup* analysis not only in that court but in other circuits as well. For a decade, the courts of appeals have applied *Schlup* inconsistently to cases with indistinguishable facts. This Court should grant the writ to clarify the *Schlup* standard and give the lower courts much-needed guidance to avoid arbitrariness in resolving claims of actual innocence, especially in capital cases. *See Gregg v. Georgia*, 428 U.S. 153 (1976).

House has presented exactly the kind of evidence specifically cited in *Schlup* as necessary to establishing a "credible" gateway claim of actual innocence, "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup*, 513 U.S. at 324. Post-conviction DNA testing has established that the semen evidence excluded House as a donor and removed the motive the jury was asked to ascribe to him. Moreover, the DNA testing has pointed to the victim's husband, who has through other evidence presented, become a very plausible alternative suspect. Post-conviction testing of the blood evidence established that the victim's blood

[10]Will, *supra*.

ended up on House's clothing not because he bludgeoned her, but because either shoddy packaging allowed the blood to spill or two law enforcement agents deliberately placed the blood onto the clothing during transportation to labs. Further, several witnesses came forward, offering detailed first-hand accounts of the victim's husband both trying to establish a false alibi and confessing to the death of his wife.

The Sixth Circuit majority acknowledged that "[House] has presented a colorable claim of actual innocence" and yet it viewed House's post-conviction evidence in isolation without considering the effect it would have had on a reasonable juror viewing it in its entirety. *House*, 386 F.3d at 684-685. In fact, the majority examined each piece of testimonial and biological evidence singly and opined as to each one why it alone failed to dismantle the case against House. *Id.* (discussing and dismissing the Letner and Parker testimony, Hubert Muncey's attempt to concoct an alibi, the semen evidence, the blood on the jeans, and the absence of blood on House's shoes). As a result, the majority– without ever putting itself in the shoes of House's trial jury-- concluded that House's evidence failed to meet *Schlup*'s "no reasonable juror" standard and therefore fell short of warranting forgiveness of a procedural default. *House*, 386 F.3d at 685. This conclusion flies in the face of *Schlup*'s express requirement that courts evaluate claim of actual innocence in light of all the evidence presented, both old and new collectively. *See Schlup*, 513 U.S. at 328 ("The habeas court must make its determination concerning the petitioner's innocence in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial.") (internal quotation marks omitted); *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986).

Meanwhile, the Sixth Circuit dissent reached the polar opposite conclusion from the majority

and announced that House had not only proffered evidence sufficient to pass through the *Schlup* gateway, but that he had sufficiently undermined the case against him as to warrant his immediate release. *House*, 386 F.3d at 708 ("The new evidence so completely turns the case around that the proof is no longer constitutionally sufficient to warrant a conviction or imposition of the death penalty."). The dissent reached this conclusion by taking a detailed look at the impact House's post-conviction case had on each piece of trial evidence. Reasoning that the trial case against House had been built entirely on circumstantial evidence and that his post-conviction evidence had "disprov[ed] the motive for the crime" and the rape aggravator and "undermin[ed] the main circumstances that gave rise to his conviction," the dissent advocated for overturning House's conviction. *Id.* at 707. The dissent relied heavily on the fact that the prosecution had persuaded the jury that rape had been the motive for House's assault on the victim and that rape had been disproven by the DNA test results showing that the semen belonged to Hubert Muncey. The dissent reasoned that the prosecution's theory of the crime had been dismantled, and therefore House's conviction became invalid. The dissent went on to pointedly criticize the majority for turning a blind eye to this fact. *Id.* at 690-692 ("[T]he State now seems to deny that the semen evidence was introduced at the state trial in 1986 to show that House attempted to rape Carolyn or that rape was the motive offered to the jury for this kidnapping and murder and the basis of the jury's verdict. This argument is simply not consistent with the facts, and the majority opinion does not acknowledge or deal with this problem.").

That judges on the same court, viewing the same record, could reach such sharply divergent conclusions in a capital case highlights the need for this Court to clarify the "no reasonable juror" standard it announced in *Schlup* and to give lower courts guidance on how to apply post-conviction

evidence of actual innocence. In fact, a review of *Schlup* cases in the courts of appeals unearths inter-circuit and intra-circuit splits on several questions confronting courts considering claims of actual innocence : 1) What is the appropriate approach for analyzing old evidence in light of new evidence? Must new evidence of innocence completely neutralize or eliminate the validity of old evidence of guilt, or is it sufficient for new evidence to raise doubt in the minds of the hypothetical "reasonable juror"?; 2) How are courts to evaluate the credibility of old and new evidence? Should judges view the evidence from the perspective of the trial jurors and assess the impact of the new evidence on the evidence the jury heard, or should they substitute their own credibility assessments in considering the weight of both kinds of evidence, or should they take some other approach?; and 3) Is it enough for the petitioner to undermine central aspects of the trial case against him, or must the petitioner present affirmative evidence of innocence in order to pass through the *Schlup* gateway?

This case cries out for clarification of the law. This Court should grant certiorari to instruct the lower courts that when a post-conviction petitioner proffers evidence which discredits the tenets of the trial case against him such that no reasonable juror viewing the old evidence in light of the new would vote to convict, *Schlup* should apply. *See Schlup*, 513 U.S. at 320-321 (emphasizing the "equitable nature of habeas corpus" and stating, "tying the miscarriage of justice exception to innocence . . . accommodates both the systemic interests in finality, comity , and conservation of judicial resources, and the overriding individual interest in doing justice in the 'extraordinary case.'").

A. IMPACT OF NEW EVIDENCE ON OLD

This Court should grant certiorari to clarify that *Schlup* requires courts to evaluate the impact of the new evidence as a whole on the evidence presented to the jury which convicted the petitioner.

See Schlup, 513 U.S. at 327-328.[11]

The divergent approaches to evaluating new evidence evinces the urgent need for clarification. For example, the Fifth Circuit has held that affidavits from trial witnesses recanting their prior testimony suffice under *Schlup*. *See Wilkerson v. Cain*, 233 F.3d 886, 889, 892 (5th Cir. 2000)("William Riley executed an affidavit in which he recanted his [trial] testimony and stated that he did not witness the killing but, rather, merely related to prison officials what another inmate had told him. Similarly, inmate Charles Lawrence, who testified at the first trial but not the second, executed two affidavits in which he recanted his testimony."); *cf. id.* at 893 (Garza, J., concurring)("The district court must hold an evidentiary hearing to assess the newly introduced affidavits because there are reasons to doubt their reliability."); *see also Fairman v. Anderson*, 188 F.3d 635, 644-645 (5th Cir. 1999)(finding that during post-conviction, trial witness Prewitt signed an affidavit alleging that his trial testimony was the result of police coercion and recanting it and finding that Prewitt's post-conviction testimony established that the petitioner acted in self defense and was therefore innocent pursuant to *Schlup*); *cf. id.* at 647.

A panel of the Sixth Circuit considering a *Schlup* gateway claim recently adopted an approach very different from the *House* majority's piecemeal approach to the evidence in this case. *See Souter v. Jones*, 2005 WL 86477 (6th Cir. Jan. 18, 2005). In *Souter*, the panel held that the petitioner had through the affidavits of several trial witnesses, who recanted central portions of their trial testimony, re-analysis of old physical evidence, and proffered testimony undermining the plausibility of the use of a particular model of beer bottle as the murder weapon, the petitioner had

[11] ("In assessing the adequacy of the petitioner's showing. . . the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial.").

met *Schlup*'s innocence standard. The *Souter* court detailed the testimonial, scientific and other physical evidence presented at trial and in post-conviction hearings and concluded that considered holistically, the old evidence viewed in light of the new evidence warranted the conclusion that Souter was actually innocent. *Id.* ("We conclude that this new evidence– the changed testimony of Drs. Bauserman and Cohle, the statements from the bottle manufacturer, the additional evidence of the forensic scientist and police laboratory technician, the photos of the bloody clothes– when taken together chips away at the rather slim circumstantial evidence upon which Souter was convicted.") (internal quotation marks omitted).[12]

In contrast, the Third Circuit has found *Brady* material not turned over at trial in the form of prior inconsistent statements from trial witnesses, eyewitnesses to the crime, insufficient under *Schlup*. *Mattis v. Vaughn*, 2003 WL 22070528 (3rd Cir. Sept. 25, 2003)("On the record, we cannot conclude that the impeachment of Watson's trial testimony with his identification of a different triggerman in the [*Brady* material] would satisfy the *Schlup* standard that no reasonable juror would have found Mattis guilty beyond a reasonable doubt. . . Moreover, Mattis has not established that no reasonable fact finder would have convicted him based on [another trial witness's] testimony alone. At most, Mattis has shown that it is possible that a reasonable juror could have acquitted him in light of the new evidence.").

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[12]The Ninth Circuit has adopted a similar approach to *Souter*. *See Cooper v. Woodford*, 358 F.3d 1117, 1120 (9th Cir. 2004) (*en banc*). The Court decided that Cooper had met the *Schlup* standard by introducing sworn declarations which "if believed, appear to indicate that a *Brady* violation has taken place and that crucial evidence introduced at trial was not reliable." *Id.* The Court reached this conclusion while acknowledging that evidence that implicated Cooper at trial still remained and was confirmed via post-conviction DNA testing. *Id.* at 1123; *cf. id.* at 1127 (Silverman, J., dissenting)("Viewed against the evidence as a whole, the information that Cooper now urges is not sufficient to establish by clear and convincing evidence that, but for the alleged constitutional errors, no reasonable jury could have concluded that he was guilty even if the [post-conviction evidence] had been available to the defense at trial.").

B. REVIEWING COURT AS REASONABLE JUROR?

Despite *Schlup*'s clear admonition that reviewing courts should not substitute their own "independent judgment as to whether reasonable doubt exists," 513 U.S. at 329, circuits have adopted different approaches to assessing the credibility of new evidence and its impact on trial evidence. The Court should grant certiorari to instruct lower courts that the perspective of the reasonable trial juror is the vantage point from which to evaluate new evidence of actual innocence.[13]

Rather than substituting their own judgment for that of the jury, some courts have put themselves in the jury's shoes and assessed the new evidence as the jury likely would have viewed it at trial. The Third Circuit substituted its own judgment for that of the trial jury in *Mattis* and concluded that at most Mattis had raised reasonable doubt, but that he fell short of showing that no reasonable juror would have convicted him in light of the new evidence. *Mattis*, 2003 WL 22070528 *45. This approach is similar to that of the Sixth Circuit majority in *House*, which viewed the evidence not from the perspective of the jury, but from its own perspective as a reviewing court. *See House*, 386 F.3d at 684-685 ("Moreover, in weighing the new evidence we review the factual findings of the district court for clear error"; "Despite his best efforts, the case against House remains strong. We therefore conclude that he has fallen short of showing, as he must, that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."); *see also McKenzie v. Smith*, 326 F.3d 721, 728 (6th Cir. 2003).[14]

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[13] *See also Jackson v. Virginia*, 443 U.S. 307 (1979)(holding that when reviewing claims that trial evidence was insufficient, "this inquiry does not require a court to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.")(internal quotation marks omitted).

[14] (finding that the petitioner had met the *Schlup* standard by undermining the credibility of a child witness's hearsay statement, which was the ground for his conviction and stating, "While such

The Fifth Circuit in *Wilkerson* explicitly put itself in the shoes of the jury in assessing the new evidence– an affidavit from an eyewitness recanting his trial testimony-- and determined that in light of the affidavit, the prosecution's trial case would have been significantly weakened in the jury's eyes. *See Wilkerson v. Cain*, 233 F.3d at 890-891, 892 (assuming the validity of the statements in the proffered affidavits and recognizing that the jury was deprived of the opportunity to assess the recanting eyewitness's credibility in light of the affidavits; "Had the jury believed that [the witness] was testifying to curry favor with the state, or that he expected some real or perceived benefit in return, the state's case would have been seriously undermined. Accordingly, it is apparent that there is more than a reasonable possibility that the verdict may have been different."); *cf. Fairman v. Anderson*, 188 F.3d at 648-649 (Jones, J., dissenting)(analyzing new facts offered to prove that the petitioner acted in self-defense and concluding that "Under the majority's ruling, perhaps we will find out what all 'reasonable jurors' would do with this case. I cordially disagree that 'more likely than not,' they will accept Fairman's claim of self-defense.").

In at least one case, the Ninth Circuit has declined to assess the credibility of the new evidence itself and deferred the credibility determination to the district court while concluding that "[the petitioner] has presented sufficient evidence, if credible, to support a finding that he is actually innocent of first degree murder." *Jaramillo v. Stewart*, 340 F.3d 877, 883 (9th Cir. 2003). In so concluding, the Ninth Circuit considered the evidence in light of the other evidence presented to the jury and thereby determined that if the evidence turned out to be credible, the jury's verdict would

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evidence could certainly be used to add to the prosecution's case, a statement made under circumstances such as those in this case by an 'incompetent' declarant simply does not constitute proof beyond a reasonable doubt. . . [W]e hold– upon the record as a whole– that the petitioner's conviction is not supported by constitutionally sufficient evidence. Although we can understand why a jury would want to convict someone for the crime involved in this case, the proof is neither substantial nor competent enough to let stand the jury's verdict. . . .").

have been different. *Id.* ("The new evidence, if credible, and considered in light of all the evidence, demonstrates that it is more likely than not that no reasonable juror would have convicted Jaramillo of the charged offenses."); *see also Majoy v. Roe*, 296 F.3d 770, 778 (9th Cir. 2002)(quoting *Schlup*, 513 U.S. at 329)("We note also that 'it is not the district court's independent judgment as to whether reasonable doubt exists,' but whether 'in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'"); *Silva v. Wood*, 2001 WL 737591 (9th Cir. June 29, 2001)("The district court erroneously failed to evaluate properly all the evidence, both old and new, relied on by Silva, and in so doing abused its discretion in finding that the new evidence has no import on previous evaluations of the totality of the circumstances")(internal quotation marks omitted).

C. AFFIRMATIVE SHOWING OF INNOCENCE REQUIRED?

Finally, circuit courts have adopted radically different approaches to the question whether *Schlup* requires an affirmative showing of innocence, more than an effective undermining of the prosecution's trial case. The Court should grant certiorari to instruct the lower courts that once the petitioner has produced enough evidence to meet the "no reasonable juror" standard, he should pass through the *Schlup* gateway, regardless of whether the new evidence entirely dismantles the pillars of the prosecution case against him or whether the new evidence affirmatively demonstrates innocence. *See Schlup*, 513 U.S. at 329, 331.

In House's case, the Sixth Circuit majority determined that despite his strong proffer of evidence undermining the prosecution's trial case, because some evidence pointing to House's guilt remained unmolested by the new evidence, he failed under *Schlup*. *See House*, 386 F.3d at 684-685. The majority went out of its way to identify the remaining shred of credibility contained in each item

of evidence which House had undermined through his post-conviction case. *Id.* at 685.[15] The majority held that because House had not debunked every piece of evidence against him, and because there were hypothetically plausible alternative explanations for his new picture of the physical evidence, House had failed to meet *Schlup*'s requirement. This holding seems to suggest that without affirmative proof of innocence absolutely exonerating House of the crime, he could not pass through *Schlup*'s gateway.

The dissent, on the other hand, concluded that because the prosecution's theory of the crime as presented to the jury – that House attacked the victim in order to rape her – had been thoroughly discredited by the DNA evidence, House had succeeded under *Schlup*. *Id.* at 690. The dissent reasoned that *Schlup* is satisfied when the trial case is sufficiently undermined, and that House's evidence was sufficient. *Id.* at 708. The dissent went on to say that House had gone as far as establishing an affirmative case of innocence sufficient to satisfy *Herrera*. *Id.* The dissent's position suggests that a substantial showing short of an affirmative demonstration of innocence will satisfy *Schlup*. *See also McKenzie*, 326 F.3d at 728.

Again, on this question as well as on the preceding two questions, other circuits have reached conclusions different from each of the Sixth Circuit's opinions and different from each other. In *Lucas*, the Fifth Circuit held that six pieces of new evidence "support[ive and] probative of Lucas's claims of innocence" which corroborated the petitioner's alibi defense which had been presented at

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[15]("House has a deep voice and Laura Muncey testified that the man who came to the trailer on the night of the murder had a deep voice;. . . Regarding House's attacks on the scientific evidence that incriminated him, he has succeeded in showing that the semen attributed to him during the trial was that of Mr. Muncey and that, at some point, the blood evidence appears to have been mishandled. . . However, the fact that the semen found on the victim's clothing came from her husband and not from House does not contradict the evidence that tends to demonstrate that he killed her after journeying to her home and luring her from her trailer, nor does the lack of any physical evidence of sexual contact contradict the notion that the murderer lured Mrs. Muncey from her home with a sexual motive.").

trial were insufficient to establish actual innocence. *Lucas v. Johnson*, 132 F.3d 1069, 1077-1078 (5th Cir. 1998). Yet, in *Fairman*, the Fifth Circuit concluded that an eyewitness who recanted his trial testimony that the petitioner had not acted in self-defense, whose credibility had been credited by the district court, sufficed to meet the "more likely than not, no reasonable juror would have voted to convict" standard. 188 F.3d at 645. There is no logical distinction between the two kinds of evidence presented in *Lucas* and *Fairman*. Both were attempts to present affirmative proof of innocence through the new eyewitness testimony. Nevertheless, the Fifth Circuit reached opposite conclusions in each case. In yet another case, the Fifth Circuit concluded that newly discovered evidence merely impeaching a central trial witness was enough to warrant consideration of the petitioner's underlying claims. *See Wilkerson v. Cain*, 233 F.3d at 891.[16]

The Ninth Circuit has similarly held that new evidence dismantling the prosecution's theory of the crime warranted allowing a petitioner to pass through *Schlup*, thereby not requiring, as the Sixth Circuit majority did in *House*, that the petitioner affirmatively establish his innocence. *Paradis v. Arave*, 130 F.3d 385, 396 (9th Cir. 1997)(discussing the impact of medical records which were *Brady* material never turned over to the defense which strongly suggested that the victim died in neither the time nor the place the prosecution had argued at trial and concluding that "[u]nder such an assessment of the medical evidence, the circumstantial evidence relied upon in Paradis' conviction would be conclusively contradicted by the medical evidence available from the record" and determining that "it may be more likely than not that no reasonable juror would have found

[16] (concluding that new affidavits from recanting eyewitnesses and from the petitioner's co-defendant claiming sole responsibility for the crime showed that "the jury was denied information essential to its assessment of [the central prosecution witness's] believability and, in turn, of the strength of the state's case against the defendant" and warranted an evidentiary hearing in district court).

Paradis guilty beyond reasonable doubt of having killed [the victim] in Idaho")[17]; *see also Jaramillo v. Stewart*, 340 F.3d at 883 (allowing petitioner to pass through *Schlup* gateway without biological evidence but based on new testimony of a previously undisclosed eyewitness).

It is impossible to reconcile these results with one another or with the result the Sixth Circuit majority reached in House's case. These wildly inconsistent results demonstrate the patchwork jurisprudence that has developed in the decade since *Schlup* was decided and the critical need for this Court to clarify that decision. That *Schlup* remains the only practical means by which a habeas petitioner with claims of actual innocence and otherwise procedurally defaulted claims of constitutional error might challenge his conviction makes this clarification all the more urgent.

II. IN A PURELY CIRCUMSTANTIAL CASE IN WHICH NEARLY EVERY INDICIA OF GUILT PRESENTED AT TRIAL HAS BEEN WHOLLY UNDERMINED BY POST-CONVICTION EVIDENCE, IS PASSAGE THROUGH THE *SCHLUP* GATEWAY WARRANTED?

Tennessee courts have long applied the well established rule that when a criminal case is based exclusively on circumstantial evidence, the defendant may not be convicted unless the facts and circumstances are "so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." *State v. Crawford*, 470 S.W.2d 610, 612 (Tenn. 1971); *Collins v. State*, 445 S.W.2d 931, 932 (Tenn. Crim. App. 1969); *State v. Transou*,

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[17] Similarly, in *Cooper*, the Ninth Circuit decided that even though unchallenged biological evidence still linked Cooper to the crime, he had presented sufficient evidence undermining the prosecution's trial evidence to warrant that he pass through the *Schlup* gateway. *Cooper v. Woodford*, 358 F.3d at 1123(allowing Cooper to file a successive petition to prove his *Brady* claim while recognizing that "There was. . . evidence pointing to Cooper's guilt at trial. Salient among that evidence was a spot of blood taken from the hallway in the [victims'] house, the bloody t-shirt, and a hand-rolled cigarette found in the [victims'] . . . car. . . Pursuant to an agreement between Cooper and the State, all three of these pieces of evidence have been subjected to DNA testing. All three resulted in a positive match with Cooper's DNA."). How should Cooper, whose DNA indisputably matched the crime scene evidence, be allowed to pass through *Schlup*, and House, who has presented credible evidence that the only physical evidence linking him to the crime is the result of botched handling of the evidence, not be allowed to so pass?

928 S.W.2d 949, 955 (Tenn. Crim. App. 1996)("[A] conviction for a criminal offense cannot be predicated solely upon conjecture, guess, speculation or a mere possibility that [the defendant] may be guilty."). The Sixth Circuit majority in *House* never acknowledged the "every reasonable hypothesis save guilt" standard, despite *Schlup*'s clear announcement that reviewing courts must consider the way the jury was instructed in assessing the impact of new evidence on the trial case against the petitioner. *See Schlup*, 513 U.S. at 331; *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992)(discussing what Louisiana law required the jury to find in order to sentence the defendant to death).

There is no question that the trial case against Paul House was entirely circumstantial. It consisted of his being seen in the vicinity where the body was found; his having misrepresented his whereabouts the night of the crime; blood on the clothes he was said to have worn the night of the crime; semen containing characteristics consistent with his found on the victim's nightgown; and his status as a stranger in the community with a sex-offense conviction. *See House*, 386 F.3d at 671-672 (quoting *State v. House*, 743 S.W.2d 141, 142-144(Tenn. 1987)("Appellant never confessed to any part in the homicide, and the testimony linking him to it was circumstantial.")); *see also State v. Davidson*, 121 S.W.3d 600, 606 (Tenn. 2003)("All of the evidence regarding Davidson's role in the killing is circumstantial. . . Davidson was a janitor in a hospital department where surgical instruments were cleaned [; the killing involved the use of surgical instruments.] [H]e did not return to work as scheduled after [the date of the crime.] . . In addition, he did not return to his residence . . . for almost three weeks after [the victim's] disappearance. . . There was also evidence that Davidson was in the area where the body was found in the days following [the victim's] disappearance."). However, because at trial he was unable to rebut much of the circumstantial case

against him, House was convicted. (This despite his trial counsel's repeated admonishment of the jury that the prosecution had not proved its case beyond a reasonable doubt.)

House's new evidence has dismantled nearly every piece of circumstantial evidence the jury heard. He has shown that the semen found on the victim was her husband's. He has shown that the blood found on his jeans more likely than not ended up there after it spilled during transportation to the crime lab. He has shown that there is no way Billy Ray Hensley could have seen House where he said he did from the vantage point that he would have had based on Hensley's own description of his whereabouts. The only part of the prosecution's case which remains unchallenged is that House lied to authorities about various details of his alibi and the source of injuries he had sustained around the time of the murder, and that he has a deep voice similar to that described by the victim's daughter as the one she heard on the night her mother disappeared. *House*, 386 F.3d at 685. This surely would not have been enough for the jury to conclude that "the finger of guilt is pointed unerringly at the defendant and the defendant alone[.]" *Crawford*, 470 S.W.2d at 613 (holding that in order to convict on circumstantial evidence alone the facts and circumstances must be so interconnected as to point exclusively at the defendant's guilt). Moreover, House has painted a plausible picture of Hubert Muncey, Jr. as the actual perpetrator of the crime.

The question, then, is when a petitioner's post-conviction case discredits much of the circumstantial evidence relied on by the jury, *and* presents a credible alternative hypothesis for the crime, does *Schlup* require that reviewing courts allow the petitioner to pass through its gateway? The Sixth Circuit dissent opined that it does. *House*, 386 F.3d at 708. *Schlup* strongly suggests that it does. *Schlup*, 513 U.S. at 331 ("Those new statements [exculpating *Schlup*] may, of course, be unreliable. But if they are true . . . it surely cannot be said that a juror, conscientiously following the

judge's instructions requiring proof beyond a reasonable doubt, would vote to convict. Under a proper application of either *Sawyer* or *Carrier*, petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict."). In House's case, the record shows that there no longer remains sufficient evidence to support the jury's verdict, which was required to point to no hypothesis save guilt. Thus, *Schlup* requires that he pass through the gateway. *Id.* This Court should grant certiorari to clarify this requirement in cases like House's in which circumstantial evidence, later discredited, formed the only basis for the petitioner's conviction. *See also Cooper*, 358 F.3d at 1123; *Carriger v. Stewart*, 132 F.3d 463, 478 (9th Cir. 1997); *Jaramillo*, 340 F.3d at 883; *Paradis*, 130 F.3d at 396; *Majoy*, 296 F.3d at 776; *McKenzie*, 326 F.3d at 726; *Souter*, 2005 WL 86477, at *13; *Wilkerson*, 233 F.3d at 892; *Fairman*, 188 F.3d at 645; *but see Lucas*, 132 F.3d at 1078.

III. THE COURTS OF APPEALS NEED CLARIFICATION OF THE STANDARD FOR FREE-STANDING CLAIMS OF ACTUAL INNOCENCE UNDER *HERRERA V. COLLINS*.

In the twelve years since *Herrera* was decided, the actually innocent have been freed from death row in ever increasing numbers. The Court should grant certiorari to announce a standard for *Herrera* claims in light of the growing body of actual innocence cases. As this Court recognized in *Herrera*, it did not announce there the standard that courts are to apply when reviewing free-standing claims of actual innocence. *Herrera*, 506 U.S. at 417; *id.* at 430 (Blackmun, J., dissenting)("Without articulating the standard it is applying, however, the Court . . . decides that this petitioner has not made a sufficiently persuasive case."). Thus, lower courts facing claims by petitioners who assert that they are actually innocent, but who are unable to point to any underlying constitutional violation infecting their trials, have lacked guidance for how to assess such claims or whether such claims

might even form a basis for habeas relief.[18] The confusion is apparent in House's case.

Six judges of the Sixth Circuit opined that House has affirmatively demonstrated his innocence and that he therefore deserves relief under *Herrera*. *See House*, 386 F.3d at 686, 690, 708. The dissenting judges suggested that the court adopt Justice White's proposal in his *Herrera* concurrence that a petitioner aiming to obtain relief upon a showing that he is actually innocent should mirror the standard in *Jackson v. Virginia*, 443 U.S. at 324. *House*, 386 F.3d at 688-89(quoting *Herrera*, 506 U.S. at 429 (White, J., concurring)). Even under this "extraordinarily high" standard, the dissenting judges concluded that House had demonstrated his innocence and deserved immediate relief. *House*, 386 F.3d at 688, 708.

As House and the other *Herrera* cases cited demonstrate, the Court's leaving the *Herrera* standard undefined has had the practical result of leaving even the Courts of Appeals who believe that preventing the execution of one who is actually innocent might be a basis for habeas relief without guidance on what a petitioner must show in order to obtain such relief. *See Whitfield*, 324 F.3d at 1020; *Wilson*, 155 F.3d at 404; *Conley*, 323 F.3d at 14; *cf. Lucas*, 132 F.3d at 1075. As a

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[18] *See Whitfield v. Bowersox*, 324 F.3d 1009, 1020 (8th Cir. 2003), *vacated in part for other reasons by Whitfield v. Bowersox*, 343 F.3d 950 (8th Cir. 2003), (holding that in order to prevail under *Herrera*, a petitioner must present evidence "unquestionably establishing his innocence"); *Jackson v. Calderon*, 211 F.3d 1148, 1165 (9th Cir. 2000)(holding that *Herrera* does not apply to claims that the petitioner lacked the mens rea for the crime for which he was convicted and that a *Herrera* petitioner must affirmatively show that he is innocent); *Wilson v. Greene*, 155 F.3d 396, 404 (4th Cir. 1998)(same); *Carriger v. Stewart*, 132 F.3d at 476 ("A habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent."); *Cooper v. Woodford*, 358 F.3d at 1124 (same); *Milone v. Camp*, 22 F.3d 693, 705 (7th Cir. 1994)(finding that *Herrera* does not apply to non-capital cases even where the petitioner had made a "credible" showing that newly discovered evidence would exonerate him); *Conley v. United States*, 323 F.3d 7, 14 n.6 (1st Cir. 2003)(noting that "it is not clear whether a habeas claim could be based on evidence *proving* actual innocence" and finding that where the most the petitioner did was to undermine the sufficiency of the evidence on which he was convicted, he did not satisfy *Herrera*); *Royal v. Taylor*, 188 F.3d 239, 243 (4th Cir. 1999)(stating that *Herrera* held that a claim of actual innocence alone is not a basis for habeas relief); *Lucas v. Johnson*, 132 F.3d at 1075 ("*Herrera* does not overrule previous holdings (nor draw them into doubt) that a claim of actual innocence based on newly discovered evidence fails to state a claim in federal habeas corpus.").

result, no federal habeas petitioner has ever succeeded in convincing a court that he deserved relief for a freestanding claim of actual innocence under *Herrera*. *But see Ex Parte Tuley*, 109 S.W.3d 388, 397 (Tex. Crim. App. 2002)(granting relief on freestanding actual innocence claim in an aggravated sexual assault case in which the complaining witness and another witness provided post-conviction affidavits contradicting the complainant's trial testimony); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 549 (Mo. 2003)(recognizing that state courts reviewing freestanding actual innocence claims may apply a lower standard than federal courts reviewing state convictions implicating such claims because state courts will not be "affected by the federalism concerns" facing federal courts; setting aside petitioner's conviction).

House's case presents a critical opportunity for this Court to revisit its decision in *Herrera* and to announce a standard which will guide courts presented with freestanding innocence claims in capital cases. Though concerns about the finality of convictions remain paramount, increasing numbers of exonerations in the twelve years since *Herrera* was decided strongly militate in favor of presenting courts with a workable framework for reviewing innocence claims, especially in death penalty cases.[19]

Paul House has successfully discredited every piece of physical evidence his trial jury was led to believe linked him to this crime. He has also seriously undermined the circumstantial case against him. He has gone even further and presented an affirmative case of innocence and identified a plausible actual perpetrator. Yet, without this Court's review, House will face death and the lower courts will continue to stumble blindly without guideposts to steer them in cases, like House's,

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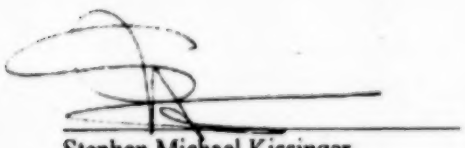
[19] According to the Death Penalty Information Center, there have been 71 exonerations of death row inmates in the years including 1993 through 2004. *See* *http://www.deathpenaltyinfo.org/article.php?did=412&scid=6#inn-vr-rc*

presenting "colorable claim[s] of actual innocence." *House*, 386 F.3d at 684.

CONCLUSION

The petition for a writ of certiorari should issue as to both questions.

Respectfully submitted,



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Counsel of record for Petitioner

No.

In the Supreme Court of the United States

PAUL GREGORY HOUSE,
Petitioner,

v.

RICKY BELL, Warden,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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CERTIFICATE OF SERVICE

I, Stephen Michael Kissinger, do swear or declare that on the 3rd day March, 2005, as required by Supreme Court Rule 29, I have served the enclosed PETITION FOR A WRIT OF CERTIORARI and MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* on each party to the above proceeding or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Jennifer Smith, Office of Attorney General and Reporter, P. O. Box 20207, Nashville, TN 37202, telephone: (615) 741-4349.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 3, 2005.

Stephen Michael Kissinger

(15)

No. 8990

In the Supreme Court of the United States

PAUL GREGORY HOUSE,
Petitioner,

v.

RICKY BELL, Warden,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 04a0345p.06

UNITED STATES COURTS OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL GREGORY HOUSE,

Petitioner-Appellant,

v.

RICKY BELL, Warden,

Respondent-Appellee.

No. 00-6136

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.
No. 96-00883—James H. Jarvis, District Judge.

Argued: March 10, 2004

Decided and Filed: October 6, 2004

Before: BOGGS, Chief Circuit Judge; MERRITT, MARTIN, NORRIS, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, and COOK, Circuit Judges.

COUNSEL

ARGUED: Stephen M. Kissinger, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. **ON BRIEF:** Stephen M. Kissinger, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

NORRIS, J., delivered the opinion of the court, in which BOGGS, C. J., SILER, BATCHELDER, GIBBONS, ROGERS, SUTTON, and COOK, JJ., joined. MERRITT, J. (pp. 17-44), delivered a separate dissenting opinion, in which MARTIN, DAUGHTREY, MOORE, COLE, and CLAY, JJ., joined. GILMAN, J. (pp. 45-46), also delivered a separate dissenting opinion.

OPINION

ALAN E. NORRIS, Circuit Judge. Petitioner Paul House appeals from the district court's denial of a writ of habeas corpus, 28 U.S.C. § 2254. A Tennessee jury found House guilty of the murder of a neighbor, Carolyn Muncey, and sentenced him to death.

This court granted a certificate of appealability as to all issues. However, House has limited his brief to a discussion of only two claims: 1) Whether the manner in which the Tennessee courts applied the state

law doctrine of waiver during House's post-conviction proceedings constitutes an adequate and independent state procedural bar to his ineffective assistance of counsel claims; and 2) assuming that the Tennessee courts properly deemed House's claims to be waived, whether that waiver should be excused on the grounds that House has established his actual innocence under *Schlup v. Delo*, 513 U.S. 298 (1995). After the Tennessee Supreme Court declined a request by an en banc panel of this court to answer certified questions relating to issues of state law, *House v. Bell*, 311 F.3d 767 (6th Cir. 2002), this court is again faced with the same claims.

Having considered the arguments of the parties regarding the two claims that are before us, we affirm the district court's denial of the writ for the reasons set forth below.

I.

This court reviews a district court's legal conclusions in a habeas proceeding *de novo* and its factual findings for clear error. *See Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir. 1999). House initiated this habeas action on September 30, 1996; the petition was amended on September 16, 1997. Consequently, this court's review of the state court's decision is governed by the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997).

Because factual determinations by state courts are entitled to a presumption of correctness, 28 U.S.C. § 2254(e)(1), we will describe the factual circumstances surrounding the murder for which House was convicted by quoting from the Tennessee Supreme Court's opinion denying him relief in his direct appeal:

> The victim of the homicide was Mrs. Carolyn Muncey, who lived with her husband and two young children on Ridgecrest Road in rural Union County, Tennessee. Mrs. Muncey was in her late twenties, and her children were about eight and ten years old at the time of her death on July 13, 1985.
>
> In March 1985 appellant Paul Gregory House was released from a prison in Utah and moved to the rural community in which the Muncey family lived. There he resided with his mother and step-father for several weeks, but in June he moved into a trailer occupied by his girl friend, Donna Turner, which was located about two miles from the Muncey home. Appellant did not own an automobile; but he was permitted to drive his mother's car from time to time, and he also drove Ms. Turner's car on some occasions.
>
> Other than doing occasional farm work for his stepfather, appellant does not appear to have been regularly employed. He did not testify at trial at either the guilt phase or the sentencing hearing. He was shown to have had one prior conviction for aggravated sexual assault, a charge to which he pled guilty on March 16, 1981 in Salt Lake County, Utah. Apparently he was placed on parole in that state, and supervision of his parole was transferred to Tennessee when he returned to this state. He was approximately twenty-three years old at the time of the homicide in this case.
>
> Mrs. Muncey disappeared from her home in the late evening of Saturday, July 13, 1985. Her badly beaten body was found on the following afternoon at about 3 p.m., lying partially concealed in a brush pile about 100 yards from her home. Apparently the husband of the victim was not at home during the early part of the evening of July 13. Mrs. Muncey and her children visited a neighbor and left at about 9:30 p.m. to return to their home. Later the older child, Laura, awoke. She testified that she heard a voice which sounded like her grandfather making inquiry about her father. She also heard someone tell her mother that her father had been in a wreck near the creek. She heard her mother sobbing or crying as she left the house. When her mother did not return, the two children went to look for her at neighboring homes. Not finding her, they returned home and waited until their father

arrived. Discovering that his wife was missing, he took the children back to the home of the neighbor where they had visited earlier in the evening and then called for members of his family to look for his wife.

When the body of Mrs. Muncey was discovered the next afternoon, she was dressed in her nightgown, housecoat and underclothing. Her body was badly bruised, and there were abrasions and blood giving every evidence that she had been in a fierce struggle. Apparently a severe blow to her left forehead had caused her death. It appeared, however, that she had also been partially strangled. A pathologist testified that the blow to her left forehead caused a concussion and hemorrhage to the right side of the brain from which she died, probably one or two hours after being struck. He testified that she probably would have been unconscious after having been struck. He estimated the time of her death at between 9 p.m. to 11 p.m. on Saturday, July 13, but emphasized that this was at best a rough estimate.

Appellant never confessed to any part in the homicide, and the testimony linking him to it was circumstantial. There was evidence showing that he knew Mr. and Mrs. Muncey and had been with them socially on a few occasions. Through defense proof there was testimony that Mrs. Muncey and her husband had been having marital difficulties and that she had been contemplating leaving him. There was no evidence to indicate that the appellant was aware of that situation, however, or that there had been any previous romantic or sexual relationship between him and the victim.

On the afternoon of Sunday, July 14, 1985, two witnesses saw the appellant emerge from a creek bank at the side of Ridgecrest Road at the site where Mrs. Muncey's body was later found concealed in the underbrush. He was wiping his hands with a dark cloth and was walking toward a white Plymouth automobile, parked on the opposite side of the road, belonging to his girl friend Donna Turner. The two witnesses spoke briefly to appellant, all of them discussing the fact that Mrs. Muncey had disappeared. Later the two witnesses became suspicious of what they had observed and returned to the point where they had seen appellant emerge from the embankment. Looking down the bank, they found the partially concealed body of Mrs. Muncey. They promptly notified the sheriff.

Appellant later admitted that he had been in the area but denied that he had seen the body of Mrs. Muncey or had any knowledge of its presence. The dark rag which he had been using when first seen was never produced. It was the theory of the State, however, that this was a dark "tank top" or jersey which appellant was shown to have been wearing on the previous evening, July 13.

Appellant gave two statements to investigating officers in which he denied being involved in the homicide. In both of these statements he stated that he had been at Ms. Turner's trailer the entire evening of July 13 and that he had not left until the next afternoon when he went to look for Hubert Muncey after learning of the disappearance of the latter's wife.

On Sunday afternoon various witnesses observed that appellant had numerous scratches and bruises on his arms, hands and body, there being an especially significant bruise on the knuckle of his right ring finger. Appellant explained that these injuries had been sustained innocently earlier during the week, but when Ms. Turner was called as a witness, she said that she had not observed them prior to the evening of July 13. Appellant also told investigators that he was wearing the same clothes on Sunday, July 14 as he had been wearing the previous evening. It was later discovered, however, that a pair of blue jeans which he had been wearing on the night of the murder was concealed in the bottom of the clothes hamper at Ms. Turner's trailer. These trousers were bloodstained, and scientific

evidence revealed that the stains were human blood having characteristics consistent with the blood of Mrs. Muncey and inconsistent with appellant's own blood. Scientific tests also showed that fibers from these trousers were consistent with fibers found on the clothing of the victim. There were also found on her nightgown and underclothing some spots of semen stain from a male secretor of the same general type as appellant.

Some of the most damaging evidence against appellant was given by his girl friend, Ms. Turner. She at first told investigators that he had not left the trailer during the course of the evening of July 13. Later, however, she modified this testimony to state that he had been in the trailer until about 10:45 p.m. at which time he left to take a walk. When he returned an hour or so later, he was panting, hot and exhausted. He was no longer wearing either his blue jersey or his tennis shoes. The shoes were later found in an area different from the place where appellant told her he had lost them.

Appellant told Ms. Turner that he had thrown away the navy blue tank top because it had been torn when he was assaulted by some persons who tried to kill him. It was after the appellant's return to the trailer that Ms. Turner first noticed the bruises and abrasions on his hands referred to previously.

Appellant's mother testified that he had not used her automobile on Saturday evening. She testified that during Saturday and Sunday she had been planning to separate from appellant's stepfather and that appellant had been assisting her in her preparations for moving.

At the sentencing hearing the State proved appellant's prior conviction for aggravated sexual assault. Appellant's parents testified that he came from a broken home and had been subjected to stress as a result of that experience. Appellant's mother also testified that in the interval between the guilt trial and the sentencing hearing appellant had attempted suicide. She read into evidence a letter which he had written to her denying his involvement in the homicide. Apparently he had cut his wrists while in the jail awaiting the sentencing hearing, but the degree and extent of the injuries were not detailed in evidence. They do not appear to have been serious and did not prevent his attending the sentencing hearing.

Although the evidence against appellant was circumstantial, it was quite strong. Particularly incriminating was the testimony that he had emerged from an embankment where the body was found, wiping his hands on a dark cloth, without disclosing to anyone the presence of the body. Damaging also were the discovery of his bloodstained trousers and the testimony of Ms. Turner, which a trier of fact could have found sufficient to demolish his alibi and to demonstrate that he had been in a heavy struggle near the time when the homicide must have occurred.[1] A classic case for determination by a jury was presented, and the evidence clearly is sufficient to support the conviction.

Following the sentencing hearing, the jury imposed the death penalty. In their verdict they found that the State had established three aggravating circumstances, these being: (1) appellant had previously been convicted of a felony involving the use or threat of violence to the person; (2) the homicide was especially heinous, atrocious, or cruel; and (3) it was committed while appellant was committing or attempting to commit or fleeing from the commission of rape or kidnaping. T.C.A. §§ 39-2-203(i)(2), (5), and (7).

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[1] After returning from his "walk," appellant suggested marriage to Ms. Turner for the first time in their relationship. It was at least arguable that he thought by this means her testimony could be rendered inadmissible by the husband-wife privilege.

> There was ample evidence to support all of these findings and to support the conclusion of the jury that no mitigating circumstances had been established which would outweigh the aggravating circumstances. Certainly the sentence of death was not disproportionate to that imposed in other cases in view of the violent and brutal nature of the homicide shown in this record.

State v. House, 743 S.W.2d 141, 142-44 (Tenn. 1987) (footnote in original).

After his conviction and sentence were handed down in February 1986, House took a direct appeal to the Tennessee Supreme Court. The Tennessee Supreme Court affirmed in the opinion just cited. House failed to seek a writ of certiorari in a timely manner.

Post-conviction proceedings began in February 1988 with the filing of a *pro se* petition for post-conviction relief in the trial court. This petition, amended after appointment of counsel, was denied by the trial court on November 29, 1988. Although claims of ineffective assistance of trial counsel were submitted to the court, they were not argued, nor was trial counsel called as a witness at the hearing. Only a single issue was taken to the Tennessee Court of Criminal Appeals: whether a jury instruction improperly misled jurors into believing that they must unanimously find mitigating circumstances. The Court of Criminal Appeals affirmed the conviction on December 15, 1989. The Tennessee Supreme Court denied leave to appeal and the United States Supreme Court denied certiorari.

A second petition for post-conviction relief was filed on December 14, 1990. After conducting hearings, the trial court denied relief on the ground urged by the State: that all the issues presented had either been previously determined in the first petition or, if not, had been waived.[2]

The Court of Criminal Appeals affirmed the trial court's decision on September 2, 1992. However, the Tennessee Supreme Court remanded for reconsideration in light of one of its recent opinions, which it later withdrew. The Court of Criminal Appeals remanded the matter to the trial court for further consideration of the waiver issue. This remand was averted, however, when the Tennessee Supreme Court re-instated the trial court's initial denial of the second petition for post-conviction relief. *House v. State*, 911 S.W.2d 705 (Tenn. 1995). Critical for this habeas action is the Court's holding concerning waiver:

> We conclude that a "full and fair hearing" sufficient to support a finding of previous determination occurs if a petitioner is given the opportunity to present proof and argument on the petition for post-conviction relief. We further conclude that the rebuttable presumption of waiver is not overcome by an allegation that the petitioner did not personally and therefore, "knowingly and understandingly," waive a ground for relief. Instead, waiver is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney. Finally, we conclude that there is no right to effective assistance of counsel in post-conviction proceedings, and therefore, an allegation of ineffective assistance of prior post-conviction counsel does not preclude application of the defenses of waiver and previous determination.

Id. at 714. Because of its holding, the Tennessee Supreme Court re-instated the trial court's original denial of relief.

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[2] We note that throughout the proceedings in this case, the Tennessee courts have consistently used the term "waiver" to include the inadvertent loss of a right or privilege. As indicated in opinions by the United States Supreme Court, the term "waiver" ordinarily refers to a specific species of loss of right or privilege, namely, an intentional relinquishment or abandonment of a known right or privilege. Inadvertent, unintentional losses are normally covered under the broader term "forfeiture." See *United States v. Olano*, 507 U.S. 725, 733 (1993) (citing *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J. concurring)). Although forfeiture is the customary term for the kind of loss of right or privilege ascribed to House in the Tennessee courts, because we are describing state law, and the state courts claimed to be applying a "waiver" doctrine, we have labeled House's loss of right or privilege a "waiver" as well.

House filed a *pro se* habeas petition on September 30, 1996, which was eventually amended after the district court granted *in forma pauperis* status and appointed counsel. The district court granted the State's motion for summary judgment on the majority of claims in an order entered June 25, 1998. In February 1999, it conducted an evidentiary hearing on House's claim that the procedural default of his ineffective assistance of counsel claims was excused because he could establish his actual innocence. After considering post-hearing briefs of counsel, the district court denied habeas relief. It also denied a certificate of appealability, a denial which was later superseded by this court's grant of a certificate as to all issues.

Although a certificate of appealability had been granted as to all issues, House has raised only two issues in his briefs to this court: 1) whether the Tennessee state courts applied the state waiver rule in such a way that it constituted an adequate and independent state ground that procedurally defaulted his ineffective assistance of counsel claims; and 2) whether, if his ineffectiveness claims were procedurally defaulted, he had made a sufficient showing of his actual innocence of the crime, permitting him to revive them. On March 11, 2002, a three-judge panel of this court issued an opinion rejecting House's claims and affirming the district court's denial of the writ. *House v. Bell*, 283 F.3d 737 (6th Cir. Mar. 11, 2002) (withdrawn). That opinion was vacated when a majority of the active judges of the court voted to rehear the case en banc. On November 22, 2002, following oral argument, the en banc court issued an opinion certifying questions of state law to the Tennessee Supreme Court. *House v. Bell*, 311 F.3d 767 (6th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 937 (2003). The Tennessee Supreme Court declined to answer the questions. *House v. Bell*, No. M2003-01952-SC-S23-CQ (Tenn. Nov. 24, 2003). Following the issuance of that order, we requested additional briefing and argument from the parties prior to rendering this decision.

II.

The first issue House has raised on appeal involves his contention that both the Tennessee courts and the district court erred when they concluded that his claims of ineffective assistance of counsel were procedurally barred.

Initially, the district court deferred granting summary judgment to the State on the claims of ineffective assistance of counsel because "these claims are intertwined with the petitioner's claim of actual innocence." Memorandum Opinion, June 25, 1998, at 41. It went on to provide the following rationale:

> [T]he court will be unable to determine whether the claims should be barred on the ground of procedural default until the conclusion of the evidentiary hearing. *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604, 1611, 140 L.Ed.2d 828 (1998) ("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'") Accordingly, in addition to petitioner's claim of actual innocence, the court will consider [the ineffective assistance of counsel claims].

Id. at 41-42. However, after conducting an evidentiary hearing and determining that House had failed to establish actual innocence, the district court held that House's ineffective assistance of counsel claims were "barred on the ground of procedural default." Memorandum Opinion, February 16, 2000, at 46-47.

House concedes that an adequate and independent state-law ground can procedurally bar subsequent habeas claims. This circuit has developed a four-part analysis to determine whether a claim is barred:

> Under *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986), this circuit utilizes the following four-part analysis when the state argues that a federal habeas claim has been procedurally defaulted in state court: (1) whether there is a procedural rule that is applicable to the petitioner's claim and whether the petitioner failed to follow the rule; (2) whether the state courts actually enforced the state procedural rule; (3) whether the state procedural rule is an adequate and independent state ground to foreclose federal relief; and if so (4) whether

the petitioner has established cause for his failure to follow the rule and prejudice by the alleged constitutional error.

White v. Schotten, 201 F.3d 743, 749 (6th Cir. 2000).

House points to the tortured path that his case took in the courts of Tennessee and argues that no hard and fast rule existed to procedurally bar his *pro se* ineffective assistance of counsel claims. Specifically, he points to the following paragraph of the opinion of the Tennessee Supreme Court:

> *Our research has revealed no reported Tennessee case dealing directly with the issue of the appropriate standard to apply when determining whether an issue has been waived.* Courts in other states have split on whether to apply a subjective or objective standard and provide us little assistance because their decisions were based largely on the particular state statutory procedure. However, Tennessee cases dealing generally with the concept of waiver in the post-conviction context apply an objective standard and impute the conduct of counsel to their clients. *See, e.g., Caruthers v. State*, 814 S.W.2d 64, 70 (Tenn. Crim. App. 1991); *State v. Bishop*, 731 S.W.2d 552 (Tenn. Crim. App. 1986).

House, 911 S.W.2d at 713 (emphasis added) (footnotes omitted). In House's view, this opinion illustrates that no rule had been clearly established.

We do not write on a clean slate with respect to this issue. *See Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001), *rev'd on other grounds*, 535 U.S. 685 (2002); *see also Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998). In *Cone*, this court made clear that the *House* opinion that House relies upon merely explained existing state law. The petitioner in that case contended that he had not personally waived a challenge to a jury instruction. In rejecting his claim, we explained:

> First, we are aware of two cases in which courts have considered whether a petitioner is bound by his attorney's waiver of a constitutional claim, *Coe*, 161 F.3d 320, and *House v. State*, 911 S.W.2d 705 (Tenn. 1995). The *House* court stated that "[w]aiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney." *House*, 911 S.W.2d at 714. *House* does not appear to announce a new standard, as Cone suggests. Rather, it seems merely to affirm Tennessee's standard of review.
>
> In *Coe*, as we explained earlier, this court held that the petitioner had procedurally defaulted his state claim that the trial court failed to give a correct malice instruction. He presented the claim for the first time in his second petition for post-conviction relief rather than his first petition, as a consequence of which the Tennessee Court of Criminal Appeals found it had been procedurally waived. *Coe*, 161 F.3d at 329-31. This court cited *House* when determining that Coe had defaulted his claim under an "objective" standard of waiver. However, the petition upon which the court relied in finding the default was filed before *House* was decided. Thus, concerning defaults that occurred before *House* was decided, the Tennessee courts have strictly and regularly applied the traditional standard of waiver, whether the waiver is made by counsel or the petitioner personally.
>
> . . .
>
> Last, we are not persuaded that Cone is correct in his claim that Tennessee law was in a state of confusion on whether an "objective" or "subjective" standard of waiver is appropriate. It is not clear from the Tennessee cases that procedural default may not be charged to a petitioner who has not himself "knowingly and understandingly" waived timely assertion of a federal constitutional claim when his attorney has done so. We are satisfied

> that Tennessee follows the traditional rule that a petitioner is chargeable with his attorney's failure to timely assert a claim and with the consequences of failing to do so.

Cone, 243 F.3d at 974. We find this reasoning dispositive of the issue before us and accordingly conclude that the district court was correct when it determined that House's ineffective assistance of counsel claims had been procedurally defaulted.

III.

We now turn to House's other claim. House argues that even if his ineffective assistance of counsel claims have been procedurally defaulted, he has established his actual innocence of the crime for which he was convicted, a showing which, if made, revives his ineffectiveness claims. In *Schlup v. Delo*, 513 U.S. 298 (1995), the Supreme Court held that a petitioner must show either cause and prejudice or a miscarriage of justice in order to obtain habeas review of an otherwise procedurally defaulted claim. House seeks to invoke the miscarriage of justice exception here. With respect to a miscarriage of justice, a petitioner must demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent of the crime." *Schlup*, 513 U.S. at 324. The Court explained the nature of this exception as follows:

> Claims of actual innocence pose less of a threat to scarce judicial resources and to principles of finality and comity than do claims that focus solely on the erroneous imposition of the death penalty. Though challenges to the propriety of imposing a sentence of death are routinely asserted in capital cases, experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful. Even under the pre-*Sawyer* regime, "in virtually every case, the allegation of actual innocence has been summarily rejected." The threat to judicial resources, finality, and comity posed by claims of actual innocence is thus significantly less than that posed by claims relating only to sentencing.
>
> Of greater importance, the individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent.

Id., 513 U.S. at 324-25 (footnote and citation omitted). The Court cautioned that this exception is rare and should be applied only in the extraordinary case, concluding that, "[t]o establish the requisite probability [that a petitioner is actually innocent], the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.*, 513 U.S. at 327.

Because the district court conducted an evidentiary hearing on this issue, there is testimony about events beyond that which was presented during the original trial. House contends that this new evidence is sufficient to establish his actual innocence. We will summarize that evidence and the district court's response to it before explaining why, in our view, House has failed to show that it is more likely than not that no reasonable juror would have convicted him.

House testified for the first time at the evidentiary hearing. He offered this version of the night of murder: "I went for a walk. I got jumped, ran around, came back." He went on to explain that the terrain was hilly and that it was dark:

> I had only been walking about maybe 20 minutes at the most it seems like. A truck pulled up behind me with. I remember it as being like a 4-wheel drive. It sat up high, you know.

> Headlights were on. It had lights across the roof of the cab and they were on. I couldn't see anything other than that about the truck. . . . I turned around and I kept walking. I believe there were at least two guys in the truck. I know the driver got out on his side, one guy got out on the passenger side. I couldn't really discern it, but I think there was one other guy in the cab. The driver came up. I can remember he said something, but I don't even know if I heard him correctly at the time. He grabbed me by the arm.
>
> He started to jerk me around. I turned around and threw him back with my left hand. I hit him. He let go. I started running. I ran kind of diagonally across the road into some trees, bushes, whatever it was. I heard a shot, at least one. There might have been two. I am not sure. I ran around through those woods for a while. I don't know how long. When I came back out—I believe at one point I ran to the right, once I got into the woods, and started heading back. . . . I went back across the road up to Donna's house. When I got, I stepped on something, a sharp rock or something. I knew I stepped on it. When I looked down I only had one shoe. I lost one of them while I was running. I took the other one off and threw it across the road.
>
> . . . .
>
> I didn't even notice my shirt was gone until I got up to the trailer.

As the factual summary of the Tennessee Supreme Court attests, this version of events is relatively consistent with the one presented by Donna Turner during the trial. When asked why he initially lied to investigators by telling them he had not left the trailer at all, House responded, "I was on parole. I didn't want to draw attention to myself."

In short, House's testimony merely restates a scenario presented to the jury that had convicted him. Moreover, the district court, which had the opportunity to assess House's demeanor, found his testimony to be less than credible.

During the evidentiary hearing, House devoted considerable time to the trial testimony of Billy Ray Hensley, the witness who saw House near the spot where the body was discovered. Specifically, House introduced maps and photographs in order to show that Hensley could not have seen what he purported to see from the place where he claimed to have been.

At trial, Hensley testified that his wife received a telephone call at about 2 p.m. on July 14 that Mrs. Muncey was missing. He drove to the Muncey trailer and talked to some of the family members. He then "went to check on [his] tobacco." After visiting his fields, he ended up on Bear Hollow Road, which was near where the Munceys lived.

He then had an encounter with House, which he described in these terms:

> [J]ust before I rounded the curve of Ridgecrest, whatever the name of that road is, I saw Mr. House come out from under a bank, wiping his hands on a black rag. And I went on down to Little Hube's[3] driveway. I pulled up in the driveway where I could see up toward Little Hube's house and I seen Little Hube's car wasn't there, and I backed back out in the road, and come back towards to the Dump Road, that is what I call it. And that is when Mr. House flagged me down. . . .

The two then had a short conversation about the fact that Mrs. Muncey was missing. House was driving his girlfriend's white Plymouth.

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[3] "Little Hube" was the nickname of the victim's husband, Hubert Muncey.

After leaving, Hensley became suspicious and, along with his friend Jackie Adkins, returned to the spot where he thought House had emerged: "I said—right along here is where I saw [House], and I got out and was looking off the bank, and [Adkins] got out and walked around the car and he said—oh, my God."

On cross-examination, Hensley conceded that he could not have seen House while he was actually "down in the embankment." He would have first seen him at the top of the bank. Defense counsel also tried to bring out some inconsistencies in Hensley's statements concerning precisely when and where he first saw House. On re-direct, the prosecution attempted to have Hensley clarify:

> Q. Let me ask you if this is a true statement—"I travelled about 500 feet on Ridgecrest Road when I saw a '66 or '67 white Plymouth sitting on the left-hand side of Ridgecrest Road," is that true?
>
> A. That's true.
>
> Q. Is that where you saw the car?
>
> A. Yes, sir.
>
> Q. Is this true? "I saw a man later identified to me as Paul G. House enter the roadway from the right-hand side of the road?"
>
> A. He was walking toward the road, yes.
>
> Q. All right. "And he was coming up over the bank and he had a rag in his hand and he was wiping his hands." is that true?
>
> A. That's true.
>
> . . . .
>
> Q. The estimation [of the distance on the road] that you have given, that you were pressed for, is that an accurate measurement or is that an estimate on your part?
>
> A. That is just an estimate.

The exhibits introduced by House during the evidentiary hearing were designed to show that Hensley could not have seen House coming up the embankment. However, even if we accept House's contention that Hensley could not have seen him until he emerged onto the road, it is undisputed that House was seen in the general vicinity of the body carrying a black rag. Moreover, trial counsel effectively cross-examined Hensley regarding his inconsistent statements about when and where he saw House. Thus, in our view, House's attack on Hensley's testimony advances his cause little, if at all.

In addition to presenting his own version of events while attempting to cast doubt on the accuracy of Hensley's testimony, House takes aim at the physical evidence that linked him to the crime.

Dr. Alex Carabia performed the autopsy of Mrs. Muncey's body. He testified at the trial that death was caused by a blow to the left side of her head. Mrs. Muncey died about an hour and a half after she was hit.

At trial, photographs of the bruises on House's body were entered into evidence and three witnesses testified about his physical condition. Prior to his arrest, House provided various accounts of their origin, attributing them to a mysterious fight on the night of the murder and to tearing down a shed a few days earlier. During closing argument, the prosecution emphasized these inconsistent statements.

Also at trial, FBI Agent Paul Bigbee testified that the blood samples taken from the victim were degraded. Nonetheless, the blood found on the jeans was consistent with that of the victim and not with that of House.

At the evidentiary hearing, House mounted a concerted challenge to this evidence.

Four vials of blood were taken from the victim during the autopsy. These were placed in a styrofoam container, which was sent from the Tennessee Bureau of Investigation (TBI) to the FBI. House referred to two demonstrative exhibits in the district court: photographs of the styrofoam container viewed from above and from the side. The container was sealed with tape by the TBI in both directions for shipping. The photograph of the side view shows that one of the seals was broken and then resealed by a second layer of tape. FBI Agent Bigbee placed his lab number on the second layer. The first layer of tape is incomplete; it only covers the lid of the container. Agent Bigbee conceded that it was possible that the first seal had been cut before the second seal had been placed over it. To support the theory that the container was opened between the time it left the TBI and arrived at the FBI, House points to the fact that the label on the container indicated that it held both blood and vaginal secretions. Yet, Agent Bigbee received the secretions separately in a manila envelope.

As mentioned above, four vials of blood were sent to the FBI. According to Agent Bigbee, he would have used one fourth of a vial in testing. House's trial serology expert, Howard Bragdon, took a photograph when he received the styrofoam container from the FBI. In House's view, the photograph shows that one of the vials was only one-half full and another was nearly empty. Furthermore, despite Agent Bigbee's testimony to the contrary, it appeared that some of the blood had spilled, although there is no evidence indicating that the spillage had occurred before the FBI received the blood.

At the evidentiary hearing before the district court, Dr. Cleland Blake, Assistant Chief Medical Examiner for the State, examined the results of the FBI tests of the blood found on the blue jeans and also the blood taken from Mrs. Muncey's body at the autopsy. He theorized, based upon the degree of the enzymatic degradation, that the blood on the blue jeans came from known samples, such as the blood contained in the vials, and not from Mrs. Muncey's body. When confronted with this conclusion, Agent Bigbee was doubtful, noting that the extent of enzymatic degradation could vary greatly from specimen to specimen taken from the same source depending upon the manner in which the specimens were handled after being extracted from the source, and upon other individual circumstances. To bolster Blake's conclusion, House asserted that the locations of the blood stains on the jeans were unlikely to have been caused by a struggle between House and the victim. The five stains were found on the outside left leg, on the inside left thigh, on the inside right pocket, outside the right pocket, and on the right cuff, respectively.

An expert on blood spatter analysis, Paulette Sutton, also testified at the evidentiary hearing. She testified, contradicting House's assertion, that the pattern of some of the blood spots on House's jeans was consistent with transfer stains resulting from blood being wiped onto them, that some of the stain patterns demarcated folds, and that the rest of the stains were consistent with spatter. She also noted, however, that some of the blood stains on the jeans were mixed with mud, although the photographs of the crime scene showed no mud present. Furthermore, National Weather Service records show that it had not rained for three days prior to the murder. Finally, there was no mud on the victim's nightgown.

Finally, House notes that no blood was found on the tennis shoes that he was wearing on the night of the murder. Charles Burks, House's trial attorney, also testified at the evidentiary hearing. The district court summarized his testimony on the issue of the tennis shoes as follows:

> During the evidentiary hearing, Mr. Burks reviewed a report from the Forensic Services Department of the TBI, which referred to Mr. House's tennis shoes and indicated the absence of blood on the tennis shoes. Mr. Burks did not recall having seen that report before. That would have been relevant to Mr. Burks because, although there was blood on

> Mr. House's jeans near the cuff, there was no blood on the shoes he was wearing at the time of the offense. The shoes were found in the general area of Ms. Turner's trailer long after the murder.

Memorandum Opinion, February 16, 2000 at 25.

The court recounted the discovery of the blue jeans in these terms:

> TBI Agent Charles Scott testified that he became involved in the investigation of Mrs. Muncey's murder, at the request of another agent, on the second day of the investigation. He took a statement from Mr. House and obtained consent to search from Ms. Turner. He went to Ms. Turner's home and seized a pair of blue jeans from the clothes hamper in the bathroom. The jeans had "reddish brown" stains that he suspected was [sic] blood on the upper part of the jeans and near the cuff; there was also some light colored mud that was not completely dry.
>
> Mr. Scott did not thoroughly examine the jeans at that time but rather folded them and put them in a paper bag. Mr. Scott did not recall ever seeing the jeans in a plastic bag.

Memorandum Opinion, February 16, 2000, at 23.

The court then summarized the testimony of House's expert witnesses. Larry Johnson testified as an expert in crime scene investigation and opined that "the packaging of materials in the case did not meet professional standards" because items were not wrapped separately. DNA expert Lisa Calandro eliminated House as the donor of the semen found on Mrs. Muncey's underwear and nightgown.

Howard Bragdon testified for House as well. Bragdon was the manager of laboratory operations for DCI Laboratory in Nashville. This laboratory had performed the blood analysis for House at trial. Bragdon noted that he took possession of the blue jeans, the victim's clothes and fingernail scrapings, as well as blood from both the victim and House, on October 29, 1985. The next day, after transporting them to Nashville, he took pictures that showed dried blood around the upper left corner of the box in which the items had been contained. According to the district court, "Mr. Bragdon admitted that it was his custom to inspect the condition of serological evidence when he took possession and that there was no notation on the receipt of spillage. Mr. Bragdon also admitted that he had no way of knowing the condition of the blood samples at the time of the FBI's serological testing." Memorandum Opinion, February 16, 2000, at 35.

The court characterized Dr. Blake's testimony as follows:

> Dr. Blake testified that there was no total chain of custody. Also, according to Dr. Blake, Dr. Carabia [the coroner] failed to refrigerate and preserve the blood in the tubes, failed to seal the tubes of blood, which could result in spillage, and failed to package the items individually.
>
> Dr. Blake's testimony was based upon his review of photographs of the physical evidence, and was relevant to Dr. Blake's opinion that the blood on petitioner's blue jeans resulted from spillage of Mrs. Muncey's blood in the laboratory tubes . . .
>
> . . . .
>
> Dr. Blake testified that if fresh blood had spilled on the blue jeans while Mrs. Muncey was alive, and then dried, the enzymes on the jeans would not have deteriorated to the same extent as the enzymes in the blood taken from Mrs. Muncey. From this, Dr. Blake concluded the blood was not spilled on the jeans but rather came from the spillage of the test tubes.

> Dr. Blake also testified with respect to the age of Mr. House's bruises, based upon photographs taken from the state court record. Dr. Blake estimated some bruises at one to two days old; others at five to six days old. Also, in Dr. Blake's opinion, the bruising on Mr. House's right ring finger was an injury from being mashed; it was not consistent with striking someone.

Memorandum Opinion, February 16, 2000, at 37-38.

The district court also summarized the testimony of the blood spatter expert, Ms. Sutton, and noted that her testimony contradicted the theory that blood had spilled from the vials onto the blue jeans "because the blood and mud [with which it had mixed] would have had to have spilled at the same time." Memorandum Opinion, February 16, 2000, at 42.

With respect to the blood, the court determined:

> Without question, one or more tubes of Mrs. Muncey's blood spilled at some time. It is likely the spillage occurred prior to the receipt of the evidence by [the] laboratory hired by Mr. House's trial attorney. Based upon the evidence introduced during the evidentiary hearing, however, the court concludes that the spillage occurred after the FBI crime laboratory received and tested the evidence.
>
> . . . [T]he enzyme deterioration, as well as Mr. Muncey's alleged confession and the blood spillage, does not negate the fact that Agent Scott saw what appeared to be bloodstains on Mr. House's blue jeans when the jeans were removed from the laundry hamper at Ms. Turner's trailer and that the blood was in fact from Mrs. Muncey.

Memorandum Opinion, February 16, 2000, at 45-46.

As indicated in the passage above, House not only presented evidence to the district court that undermined the case against him, he also offered an alternative theory of the crime: that Mr. Muncey killed his wife.

At the evidentiary hearing, House produced witnesses who testified about Mr. Muncey's alcoholism and also his physical abuse of his wife. One acquaintance, Kathy Parker, testified that "[Mrs. Muncey] was constantly with black eyes and busted mouth." A friend, Hazel Miller, testified that Mr. Muncey told her that he was going to get rid of his wife a few months before her death. In the district court, Mr. Muncey acknowledged that he "smacked" his wife at least once.

As for the day of the murder, Mr. Muncey was supposed to have helped to dig a grave. He had gone over to his father's place, helped to work on some cars, and then dug the grave. However, rather than go home, he decided to attend the weekly dance at the C & C Recreation Center, where, according to his testimony, he stayed until midnight. When he arrived home, he found his wife missing.

Kathy Parker told the district court that Mr. Muncey visited her on a Friday in 1985 after the murder. Friends were sitting around drinking when Mr. Muncey "started crying and going on and rambling off." According to Parker, he was "[t]alking about what happened to his wife and how it happened and he didn't mean to do it, but I don't know exactly what all was said." She went on, "[H]e said they had been into an argument and he slapped her and she fell and hit her head and it killed her and he didn't mean for it to happen." According to Parker, Mr. Muncey was drunk when he made this confession. After hearing it, Parker claimed, "I freaked out and run him off." The next day Parker's mother took her to the courthouse to tell someone about the confession. However, she "never did really get to talk to anybody." When the district court asked her about the motivation behind her testimony in the evidentiary hearing, she replied, "An innocent man is in jail."

On cross-examination, Parker testified that she had tried to come forward but no one seemed interested. She had had seven or eight beers on the night of the confession.

Parker's sister, Penny Letner, also testified to having heard such a confession from Little Hube. Once again, she recalled that he was "pretty well blistered." According to Letner, Mr. Muncey confessed to killing his wife when he returned home:

> He said he didn't mean to do it. That she was "bitching him out" because he didn't take her fishing that night, that he went to the dance instead. He said when he come home that she was still on him pretty heavily "bitching him out" again and that he smacked her and that she fell and hit her head. He said I didn't mean to do it, but I had to get rid of her, because I didn't want to be charged with murder.

Letner had not been drinking. She was frightened by the talk and left the party. As a young mother of 19, she testified that she had been too scared to report the confession.

Based upon the statements of Letner and Parker, House posits the following scenario:

> When Mr. Muncey got home, he and his wife resumed their fight. He hit her at least once and she fell. When he checked, he found that he had killed her. He took her body down by a creek running near their home and hid it with some brush and branches.
>
> Whether Mr. Muncey ever went back to the dance is uncertain. Constable Wallace, who was providing security at the dance, testified that he never saw Mr. Muncey return after he left around 10:30 p.m. Mr. Muncey claimed during the hearing that he never left the dance until it broke up some two or more hours later.

Petitioner's Brief at 33-34. House also points out that Dennis Wallace[4] did not think that Mr. Muncey seemed upset when he reported his wife's disappearance or when the body was recovered. Also, the morning after the murder, Mr. Muncey asked a neighbor, Artie Lawson, to tell people that he was at the dance. Since she had not attended it herself, Ms. Lawson declined. Her daughter, Mary Atkins, testified that she not only saw Little Hube at the dance, but that she saw him hit his wife.

The district court discounted the testimony of Letner and Parker, finding their testimony lacking in credibility:

> The court is not impressed with the allegations of individuals who wait over ten years to come forward with their evidence. This is especially true when there was no physical evidence in the Munceys' kitchen to corroborate his alleged confession that he killed her there.

Memorandum Opinion, February 16, 2000, at 45. Instead, the court credited the testimony of Laura Muncey Tharp, the victim's daughter, who testified at both the trial and evidentiary hearing:

> While in bed, she heard a deep voice saying her dad had been involved in a wreck next to the creek. Sometime later she and her brother got up and went looking for their mother. They went to the neighbors and looked up and down the driveway. She did not see anything out of the ordinary in the house; nothing was out of place and there was no sign of a struggle.
>
> According to Ms. Tharp, her parents got along fine. They argued, but she did not recall any physical pushing or hitting. If they argued, she could hear them if she was in her

[4] Dennis Wallace was the Chief of Police of Luttrell, the nearest town.

bedroom. The family did not have air conditioning in the home. She did not hear any arguments that night.

The court found Ms. Tharp a very credible witness. She had no reason to lie. Her testimony during the evidentiary hearing was consistent with her trial testimony.

Memorandum Opinion, February 16, 2000, at 12-13.

As the preceding recitation makes clear, House has mounted a concerted attack on his conviction. Indeed, it is fair to say that he has presented a colorable claim of actual innocense. However, as the Supreme Court has made clear, that is not the standard that we are bound to apply. To prevail, House must do more than raise questions about the reliability of portions of trial testimony or the manner in which physical evidence was handled or analyzed; he must show "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327. Moreover, in weighing the new evidence we review the factual findings of the district court for clear error. *Campbell v. Coyle*, 260 F.3d 531, 539 (6th Cir. 2001).

The following facts that implicate House are undisputed: he lied to investigators about his whereabouts on the night of the murder; he gave inconsistent versions of the origins of the scratches and bruises on his hands and arms; he was seen near where the body was discovered on the day after the murder; he lied about what he was wearing on the night of the murder; blue jeans belonging to House, spattered with blood mixed with mud, were found at the bottom of Ms. Turner's laundry hamper; House has a deep voice and Laura Muncey testified that the man who came to the trailer on the night of the murder had a deep voice; and, according to Ms. Sutton, the blood and mud found together on House's blue jeans had been mixed together, which "certainly eliminates the possibility of any stains being created by contamination in an evidence container." We note that the fact that mud may not have been present at the crime scene, and may have been scarce in the surrounding area, cannot be taken as proof that there was no mud anywhere on the route between Ms. Turner's trailer and the scene of the crime.

With respect to House's theory that Mr. Muncey committed the murder, we defer to the finding of the district court that Ms. Letner and Ms. Parker, who allegedly heard Mr. Muncey's confession, were not credible. Furthermore, the content of Ms. Letner's testimony, indicating that Mr. Muncey killed his wife upon returning to the trailer, is belied by the presence of the children in the trailer, who heard no such confrontation, and the lack of any signs of a struggle. House's theory that a deep laceration cutting across Mrs. Muncey's head was caused when she fell and hit her head is inconsistent with the testimony of Dr. Carabia, who indicated that the laceration could only have resulted from a violent blow. The fact that Mr. Muncey may have asked his neighbor to say that she saw him at the dance during the time of the murder is insufficient to tip the balance in favor of House's theory.

Regarding House's attacks on the scientific evidence that incriminated him, he has succeeded in showing that the semen attributed to him during the trial was that of Mr. Muncey and that, at some point, the blood evidence appears to have been mishandled, resulting in spillage. However, the fact that the semen found on the victim's clothing came from her husband and not from House does not contradict the evidence that tends to demonstrate that he killed her after journeying to her home and luring her from her trailer, nor does the lack of any physical evidence of sexual contact contradict the notion that the murderer lured Mrs. Muncey from her home with a sexual motive. As for the mishandling of the blood evidence, the theory that the blood on House's jeans came from the vials of blood gathered at Mrs. Muncey's autopsy is based upon a speculative theory regarding enzyme degradation that was contradicted by other testimony in the record, and an analysis of the blood stain pattern does not demonstrate that the stains could not have resulted from Mrs. Muncey's murder. The lack of any blood spatter on House's shoes is inconclusive as well, because it is not clear when House took his shoes off. Finally, the district court's conclusion that "the spillage occurred after the FBI crime laboratory received and tested the evidence" cannot be characterized as clearly

erroneous. The only unchallenged blood evidence, the testimony indicating that the blood and mud on the jeans were mixed, tends to support the conclusion that House committed the murder.

Despite his best efforts, the case against House remains strong. We therefore conclude that he has fallen short of showing, as he must, that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.

IV.

All of the issues before us having been decided, the judgment of the district court is **affirmed**.

DISSENT

MERRITT, Circuit Judge, dissenting. I regard this as the rare or extraordinary case in which the petitioner through newly discovered evidence has established his actual innocence of both the death sentence and underlying homicide. The Court's opinion, like the Attorney General's argument for the State, regards as "undisputed" old evidence and inferences that are now contradicted by other evidence in the case. It fails to describe adequately the persuasive case of actual innocence that the petitioner's newly discovered evidence raises. Nor does it adequately describe the legal standards to be applied.

This dissent will first describe the constitutional standards applicable in "actual innocence" cases such as this one. There are four actual innocence theories applicable in this case based on the body of newly discovered evidence presented at the federal habeas hearing: (1) a "free-standing," substantive, so-called "*Herrera*" actual innocence claim, (2) a procedural, or "gateway," so-called "*Schlup*" actual innocence claim, (3) the more limited "gateway" claim that the petitioner is "actually innocent of the death penalty" because the new body of evidence shows that petitioner is not now eligible for the death penalty because the rape aggravator has been disproved, and (4) a free-standing, substantive "actual innocent of the death penalty" claim. It will then outline the evidence in detail and apply the standards in four parts, as follows:

First, at the state trial in Maynardville, Union County, Tennessee, in 1986, and in its argument to uphold the death verdict in the Tennessee Supreme Court, the State relied on rape as the motive for the kidnapping and the murder of Carolyn Muncey. There was no other motive offered. It relied on a semen specimen on her nightgown as proof that House tried to rape her. Newly discovered DNA evidence now conclusively establishes that the semen was her husband's. There is now absolutely no evidence of sexual assault. The new evidence disproves the motive the jury accepted as the basis for the kidnapping and murder and the aggravating circumstances the jury found as its basis for the death penalty.

Second, besides the semen evidence, the State introduced at the trial one other piece of highly incriminating scientific evidence: evidence of Carolyn Muncey's blood on House's blue jeans worn on the night of the murder. At the 1999 federal habeas hearing, the State's case was undermined by the State's own medical examiner, Dr. Cleland Blake. As "Consultant in Forensic Pathology" for the Tennessee Bureau of Investigation for 22 years, Dr. Blake has testified for the prosecution in the past in hundreds of cases. Four vials of blood were extracted at the time Carolyn Muncey was autopsied. Dr. Blake, the State's medical examiner, testified at length that he had no doubt that the blood on House's pants was spilled from one of these four vials of blood shipped to the lab by local law enforcement agents — spilled either accidentally or intentionally. There is no explanation besides spillage for the fact that one of the four vials of blood was empty. The new body of evidence shows conclusively that the vials of blood were not properly handled and shipped by law enforcement and that the blood that spilled from the vials cannot otherwise be accounted for.

Third, testimony from five new witnesses offered at the habeas hearing implicates Mr. Muncey in his wife's murder. The new evidence discloses that Mr. Muncey, with a flood of tears, confessed to two women friends after the murder that he had killed his wife. He told a third woman that he was going to "get rid" of Carolyn a few weeks before the murder. He asked a fourth woman to provide him with an alibi on the night of the murder and gave testimony about his whereabouts that night at the time of the murder that has now been contradicted by a local law enforcement officer. The State offered no evidence that any of these witnesses was biased in favor of House or prejudiced against Mr. Muncey.

Fourth, the evidence completely undermines the reliability of the testimony of Billy Ray Hensley, the witness who said that on Sunday afternoon before the victim's body was found, he saw House coming up the embankment on Ridgecrest Road where the body was later found that day. Based on his own

testimony and an examination of the record, it would have been impossible for Hensley to see House as he claimed.

Union County, Tennessee, is a small rural county in the hill country of East Tennessee. It has a population of 12,000. Maynardville, population 1,000, is the county seat where Carolyn Muncey's murder was investigated and tried. Local law enforcement officials from the Sheriff's office testified that immediately after the murder they had two suspects, House and the victim's husband, Hubert Muncey, called "Little Hube." Mr. Muncey grew up and was well-known in the local community. Although "Little Hube" had a history of severe domestic abuse, the local police chose House as the murder suspect when he told them two days after the body was found that he had just recently moved into the local Luttrell community and that he had a sexual assault conviction in Utah and after they had developed other incriminating evidence.

In its opinion in 1987, affirming House's conviction, the Supreme Court of Tennessee noted the semen evidence and rape as the motive for the homicide. It noted that House had "never confessed to any part in the homicide, and the testimony linking him to it was circumstantial." The Court also observed that the Munceys "had been having marital difficulties and that she had been contemplating leaving him." *State v. House*, 743 S.W.2d 141, 143 (Tenn. 1987). The case comes down to the question of whether the newly discovered evidence undermining the case against House and incriminating Mr. Muncey is sufficiently strong — despite the uncertainties that remain — to preclude a rational juror from finding guilt beyond a reasonable doubt and to make the execution of House "constitutionally intolerable."

I. Standards for Actual Innocence Claims

Schlup v. Delo, 513 U.S. 298 (1995), is the only Supreme Court case that has discussed and compared the standards to be applied in three of the four different types of actual innocence claims that may be asserted in habeas: (1) "free standing," (2) "gateway" and (3) "innocent of the death penalty" gateway claims. There, in an opinion for six members of the Court, Justice Stevens wrote that it is "firmly established in our legal system, that the line between innocence and guilt is drawn with reference to a reasonable doubt," and that "the analysis [of actual innocence claims] must incorporate the understanding that proof beyond a reasonable doubt marks the boundary between guilt and innocence." *Id.* at 328. This starting point is a major factor for all types of actual innocence claims. For such claims, this factual analysis is always a "probabilistic determination" about the behavior of a reasonably instructed juror. *Id.* at 329.

1. Gateway, Actual Innocence Claims. — In *Schlup*, 513 U.S. at 316, the Court stated that for substantive, free-standing claims where the "conviction was the product of a fair trial," the "evidence of innocence would have had to be strong enough to make an execution 'constitutionally intolerable.'" Yet, when a claim of innocence is coupled with an assertion of constitutional error at trial, the "conviction may not be entitled to the same degree of respect." *Id.* Thus, the "evidence of innocence need carry less of a burden." *Id.* In *Schlup*, as in House's gateway claim in the instant case, the claim of constitutional error at the original trial was ineffective assistance of counsel; and the actual innocence claim was used as a "gateway" to overcome procedural default in order to reinstate the ineffective assistance claim and render it again cognizable. For such gateway or procedural claims, the *Schlup* opinion holds that a petitioner must demonstrate that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327.

2. Gateway Innocent of the Death Penalty Claims. — The Court in *Schlup* discussed and left intact the standard for claims of "innocent of the death penalty" (claims that the evidence of aggravating circumstances at the sentencing phase of the case is insufficient to render the defendant eligible for the death penalty) — a standard announced in the previous case of *Sawyer v. Whitley*, 505 U.S. 333 (1992). In such "innocent of the death penalty" claims governed by *Sawyer*, the question is always whether the petitioner's proof of innocence is sufficient to overcome a procedural default and render a defaulted constitutional claim again cognizable. Quoting *Sawyer*, the Court said that claims of actual innocence of the death penalty at

the sentencing phase "must focus on those elements which render the defendant guilty of the death penalty" and show "by clear and convincing evidence" that "no reasonable juror would have found the petitioner eligible for the death penalty" beyond a reasonable doubt. *Schlup*, 513 U.S. at 323. This is the standard applicable to the question of innocence of the rape-homicide aggravator found by the jury at House's trial. If found, it would make House's ineffective assistance of counsel claim at the penalty phase of the case cognizable.

3. Free-standing Actual Innocence Claims. — In *Herrera v. Collins*, 506 U.S. 390 (1993), the Supreme Court did not spell out a standard for free-standing substantive claims of actual innocence in cases which presuppose a fair trial. Instead, it merely noted that the required "threshold showing" would be "extraordinarily high." 506 U.S. at 417. In a concurring opinion, Justice White sets out a very demanding standard:

> I assume that a persuasive showing of "actual innocence" made after trial, even though made after the expiration of the time provided by the law for the presentation of newly discovered evidence would render unconstitutional the execution of petitioner in this case. To be entitled to relief, however, petitioner would at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, "*no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.*"

Id. at 429 (White, J., concurring) (quoting *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)) (emphasis added).[1] As laid out below, the White standard is appropriate to apply in free-standing actual innocence claims. Justice White's proposed standard borrows language from *Jackson*, in which the Court established the test governing habeas review of claims of insufficient evidence. In *Jackson*, the Court found that due process guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof — defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of the element of the offense," 443 U.S. at 316. When petitioners make *Jackson* claims, they assert that the trial leading to their conviction was flawed in that the evidence of guilt presented in the trial record was insufficient to support the verdict.

With free-standing actual innocence claims, petitioners are not claiming that their trial violated constitutional due process requirements due to insufficient evidence. Instead *Herrera* claims are to provide relief to one who faces the death penalty and can make a truly persuasive case of innocence. In order to prevent what the Supreme Court describes as "constitutionally intolerable," *Schlup*, 513 U.S. at 316, courts must consider newly discovered evidence in addition to the trial record. The proof established at the original trial must be examined in light of what is newly proffered to determine if all the available evidence would support conviction. The White standard is appropriate for use in free-standing actual innocence cases as it is a very high standard that will only be met in exceptional cases where new evidence has unquestionably undermined the case against the petitioner. It also forces courts to make an objective determination regarding what a fact finder *could* find rather than what a hypothetical juror *would* find.

Utilizing Justice White's standard would permit courts to adequately address the rare case of actual innocence without becoming bogged down by non-meritorious claims. Justice O'Connor in *Herrera* noted the Court's concern that if the standard for free-standing actual innocence cases is set too low, "federal courts will be deluged with frivolous claims of actual innocence." 506 U.S. at 426 (O'Connor, J., concurring). The White standard borrowed from *Jackson* addresses this concern as new evidence would have to so undermine the case against the petitioner as to make the conviction untenable and the imposition

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[1] Justice Blackmun for himself and Justices Stevens and Souter also defined a standard for free-standing actual innocence cases stating that "a prisoner must show not just that there was probably a reasonable doubt about his guilt but that he is probably actually innocent." 506 U.S. at 434-35 (Blackmun, J., dissenting). The White standard does not appear to be at odds with the formulation suggested by Justice Blackmun. Petitioners who could meet the White "no rational juror" test would also meet the Blackmun "probably innocent" standard.

of the death penalty constitutionally intolerable. The Court has noted that the *Jackson* standard is an incredibly high hurdle for a petitioner to jump. *See Schlup*, 513 U.S. at 323 n.38 ("Even the high standard of proof set forth in *Sawyer* falls short of the *Jackson* standard governing habeas review of claims of insufficiency of evidence."). Under the proposed standard, "the mere existence of sufficient evidence to convict would be determinative of a petitioner's claim." *Id.* at 330.

The inquiry as to whether any rational juror could convict also seeks to make the determination of actual innocence more objective. As the Supreme Court wrote, describing the standard, "the use of the word 'could' focuses the inquiry on the power of the trier of fact to reach its conclusion," whereas "the use of the word 'would' focuses the inquiry on the likely behavior of the trier of fact." *Id.* Whether a rational fact finder would have the ability to convict the petitioner in light of all available, reliable, and relevant evidence "requires a binary response." *Id.* Either the evidence is sufficient to support the conviction or it is not. The analysis thus interferes with the original trial determination only to the extent necessary to ensure that a prisoner is not executed when the available evidence cannot support his conviction. This Court should adopt Justice White's standard from *Herrera*, and the writ should issue if in light of newly discovered evidence, no rational trier of fact *could* find proof of guilt beyond a reasonable doubt.

4. Free-standing Innocent of the Death Penalty Claims. — Although not discussed in *Schlup* or other cases, for cases raising a substantive, non-gateway claim that the condemned prisoner is not eligible for the death penalty at sentencing, the standard should be the same as the White standard. The petitioner must demonstrate no rational fact finder examining the trial record and the new evidence could impose the death penalty. If he can disprove the aggravator for which he was sentenced to death, it is plainly unconstitutional for the sentence to stand.

In my view, as I will now explain, the petitioner has carried his burden of proof on all four theories. He has clearly shown both that a reasonable juror would have a substantive and serious doubt as to his guilt and that the cumulative evidence is insufficient to enable a rational juror to convict House or sentence him to death for the murder of Carolyn Muncey.

II. Rape as House's Motive — the Semen Evidence

In its opinion, the Tennessee Supreme Court in its factual statement recounted evidence of rape as the motive for the kidnapping and murder noting that "there were found on her nightgown and underclothing some spots of semen stain from a male secretor of the same general type as appellant," *State v. House*, 743 S.W.2d 141, 143 (Tenn. 1987), and referring to inferences available to the jury from the fact that "the state proved appellant's prior conviction for aggravated sexual assault." *Id.* at 144.

In light of the evidence introduced at the federal habeas hearing, the State now concedes that the semen specimen found on the nightgown Carolyn was wearing when murdered was "Little Hube's," not House's; and there is no other evidence of rape or sexual assault. The State's concession is based upon DNA analysis introduced at the habeas proceeding by counsel for House. But the State now seems to deny that the semen evidence was introduced at the state trial in 1986 to show that House attempted to rape Carolyn or that rape was the motive offered to the jury for this kidnapping and murder and the basis of the jury's verdict. This argument is simply not consistent with the facts, and the majority opinion does not acknowledge or deal with this problem. The State has no other explanation or evidentiary basis for introducing the semen evidence at the trial other than to show attempted rape as the motive. Because the Court's opinion does not deal with the problem and the State now denies what it strongly claimed when it tried the case and obtained the death verdict, we will itemize in some detail the evidence that contradicts the State's present argument that the prosecution did not rely on rape as the motive for the murder and for the death penalty aggravator.

From the beginning in July 1985, the police and prosecutors viewed this as a rape murder case and so advised the FBI lab and then the jury. In the various lab reports from the FBI to the local prosecutors,

the correspondence is always designated as "rape-homicide." The first lab report described the crime as "rape-homicide" two weeks after the murder:

REPORT

of the

FBI

Laboratory

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

July 29, 1985

To: Mr. Williams Paul Phillips
District Attorney General
Post Office Box 10
Huntsville, Tennessee 37756

FEDERAL EXPRESS

FBI File No.

LAB NO. 50717040 S XI VB VJ
50722020 S XI VB

YOUR NO.

Re: PAUL GREGORY HOUSE - SUSPECT;
CAROLYN MUNCEY - VICTIM;
RAPE - HOMICIDE

Examination requested by: Addressee and Sheriff of Union County, Maynardville, Tennessee

Reference: Letter from District Attorney General dated July 16, 1985, and letter from Sheriff of Union County dated July 19, 1985

Examination requested: Chemical Analyses - Microscopic Analyses - Mineralogy

FBI File, Criminal Trial Exhibits, Addendum No. 2, Exhs. 31 & 32, admitted into evidence, Addendum No. 4, p. 903.[2]

Four such lab reports designating House as the "suspect" and "rape-homicide" as the nature of the case were shown to the jury at House's trial on February 6, 1986, after being admitted into evidence as State's exhibit 32. The jury read a letter from Union County District Attorney William Paul Phillips dated July 16, 1985, to the FBI lab in Washington stating that this was a "sexually motivated attack." *Id.* at p. 6. Then the jury saw four FBI lab reports like the one above referring to House as the "suspect," "Carolyn

[2] Citations to the state trial record will reference the multi-volume Addenda filed during the federal habeas proceeding in Case No. 3:96-CV-488 (E.D. Tenn., Jarvis, J.).

Muncey—victim," and the nature of the case described as "rape-homicide." *Id.* at pp. 4, 10, 12, 34. The FBI lab reports analyze the semen based on the presupposition that it was "House's" semen. On each of the lab reports placed before the jury the words "FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE" are prominently displayed at the top of the page just before "rape-homicide" is identified as the nature of the case and House as the "suspect." *Id.*

The semen evidence referred to in these reports was placed before the jury and came in at the state trial through the testimony of long-time FBI expert Agent Paul D. Bigbee, who specialized in analyzing "physical evidence in criminal cases for the presence of blood and other body fluids." Testimony of Paul Bigbee, Trial Transcript, Addendum No. 4, Vol. VI, p. 883. He testified at length about the semen evidence. Here are a few examples of his testimony on this subject:

Q All right, did you find semen on any of her items of clothing?

A Yes sir, I did.

Q Where did you find the semen?

A I found semen in the panties and on the gown.

. . . .

Q Now, can you tell me, can you detect semen stains at times in determining things about the blood type of the person who emitted or the blood type of the person that semen is from?

A Yes, sir. If the person who deposited the semen is a secretor, which means eighty (80) percent of the population secrete the ABO blood group substances in other body fluids, such as semen and saliva, if that person is a secretor, then the ABO blood type can be determined from the semen.

Q How about Mr. House, is he a secretor?

A Yes sir, he is.

. . . .

Q Can you tell me where, can you hold the gown up and show the jury where on the gown you found semen?

(WITNESS COMPLIES WITH REQUEST)

A If you look on the front of the gown, at the very bottom here, you can see one cutting I took that has the number and letter, 1S, that is the location where I found the semen.

Q On the front of the gown?

A Front bottom portion.

. . . .

Q You may put that back now. What can you tell us about the blood type, if you can tell us anything, of the person who that semen came from, the male that that semen came from?

A The person who deposited that semen was a blood type A.

Q Now, what blood type is Mr. House?

A He is blood type A.

. . . .

Q [T]he semen on the nightgown could be from Mr. Muncey?

A It could be, however, I was not able to determine his secretor status.

Q And he is not definitely a secretor?

A I don't know whether he is or not. I could not determine that.

Q But you know that Mr. House definitely is a secretor?

A Yes, sir.

Q And only if a person is a secretor, can you determine the blood type from the semen, is that right?

A That is correct.

Id. at pp. 896-900.

In the State's argument to the jury at the end of the guilt phase of the trial, the District Attorney told the jury that rape was House's motive in the following words:

> Now you may have an idea why he did it. The evidence at the scene which seemed to suggest that he was subjecting the lady to some kind of indignity, why would you get a lady out of her house, late at night, in her night clothes, under the trick that her husband has had a wreck down by the creek? Why is it that you want to get her down by the creek?.... It is either to keep her from telling what you have done to her, or it is that you are trying to get her to do something that she nor any mother on that road would want to do with Mr. House .... and you kill her because of her resistance.

Closing Argument. Trial Transcript. Addendum No. 4, Vol. IX, pp. 1302-03.

After the jury returned its verdict at the guilt phase of the trial, the District Attorney advised the court in preparation for the sentencing phase of the trial that the State's theory requesting a death sentence is based on "the fact that there was semen on the outer garment, that is the nightgown," and "we say that

the jury could well conclude that this murder occurred in the process of another crime, that being in the process of either rape or attempted rape." Trial Transcript, Addendum No. 4, Vol. X, p. 1381. The prosecutor opened his argument at the sentencing phase by telling the jury:

> The defendant, the proof indicates, has in the past been convicted of aggravated sexual assault which is something that the judge will instruct you that you should consider....We also think the proof shows strong evidence of attempted sexual molestation of the victim to accompany the taking away and murdering her.

Id. at pp. 1410-11. The prosecutor then tied the prior conviction for sexual assault and this attempted rape together arguing in favor of the death penalty because House has "been through the process before and having been convicted of a crime involving . . . aggravated sexual assault," he "cannot benefit from the type of rehabilitation that correction departments can provide." *Id.* at p. 1413. Then at the end of his impassioned argument at the sentencing phase, the District Attorney returned again to this theme asking the question, "did he commit this crime while he was engaged in an attempt at rape?" *Id.* at 1444. And then he answered that question in the affirmative.

As soon as the District Attorney sat down, the court charged the jury that the defendant "was previously convicted of" sexual assault and then defined rape: "I will charge you that rape is the unlawful, carnal knowledge of a woman forcefully and against her will. Carnal knowledge is accomplished by the commencement of the sexual connection and proof of emission is not required." *Id.* at p. 1447. The court again for a second time said in charging the jury that they may sentence the defendant to death if "the murder was committed while the defendant was engaged in committing or was attempting to commit or was fleeing after committing or attempting to commit rape," and defined rape again as "the unlawful carnal knowledge of a woman, forcibly and against her will." *Id.* at p. 1448. The jury then returned its verdict of death saying that its reason for sentencing the defendant to death was that "the murder was committed while the defendant was engaged in committing or was attempting to commit or was fleeing after committing or attempting to commit rape or kidnapping." *Id.* at p. 1455.

When House appealed to the Tennessee Supreme Court, the State in its brief was not hesitant to argue rape as the motive for the kidnapping and the murder and the basis of the jury's death sentence. In its brief, the State argued that the murder was committed while the defendant was engaged in attempting to commit rape and that "[s]emen was found on the victim's gown and panties and was consistent with the defendant's blood type." Brief of the State of Tennessee, S. Ct. No. 2, Union County, filed Apr. 29, 1987, Addendum No. 6, p. 49. It is against this background that the Tennessee Supreme Court cited the prosecution's claim that the evidence proved that "on her nightgown and underclothing some spots of semen stain from a male secretor of the same general type as appellant." *State v. House*, 743 S.W.2d at 143. The Tennessee Supreme Court upheld House's conviction and the imposition of the death penalty based upon rape as the motive for the kidnapping and murder. *Id.* at 142. Even at the federal habeas corpus hearing 13 years later, Assistant Attorney General Glenn Pruden for the State, said that at the trial "an aggravating factor was found that this murder was committed in the attempt to commit, to perpetrate a rape and the perpetration of the kidnapping." *House v. Bell*, No. 3-96-CV-883, Transcript of Habeas Hearing, p. 91 (E.D.

Tenn. Feb. 1, 1999).[3] There can be no doubt that the State claimed rape as the motive from the beginning and throughout the trial, and that the jury so found and that the Tennessee Supreme Court approved the verdict on that basis.

The newly discovered evidence conclusively removes rape as the motive and eliminates rape as the aggravating circumstance that made the defendant eligible for the death penalty. Without any evidence of rape, the State has lost its motive, its theory of the case and the aggravating circumstance on which the State and the jury relied for its death verdict. House has met the standard for actual innocence of the death penalty by conclusively disproving the aggravator that made him eligible for the death penalty. No rational, reasonable juror could now find that House raped or attempted to rape Mrs. Muncey. Without any evidence of rape, the court would now have to direct a verdict in favor of House on this issue.

III. The Blood Evidence

The State introduced at trial one other piece of highly incriminating scientific evidence: evidence of Carolyn Muncey's blood on the blue jeans worn by House on the night of the murder. Agent Paul Bigbee, the agent from the FBI laboratory that did the actual testing on the blue jeans in July 1985, shortly after the murder, testified that his testing demonstrated a clear match between the blood on the jeans and Mrs. Muncey's blood. At the 1999 federal habeas hearing, however, the State's case was undermined by its own medical examiner, Dr. Cleland Blake. Dr. Blake, the Assistant State Chief Medical Examiner, has been a consultant in forensic pathology for the Tennessee Bureau of Investigation for 22 years and has testified for the State in hundreds of cases. Dr. Blake testified at length that, based on enzymatic testing results performed by the FBI, he had no doubt that the blood on House's blue jeans was spilled, either accidentally or intentionally, from the vials of blood taken from Mrs. Muncey's body during her autopsy:

> Dr. Blake: I conclude that the deteriorated blood which was in the jeans *came out of the test tube* [because] both [the blood on the jeans and the blood in the vials] had lost the enzyme.
>
> . . .
>
> The Court: So in your opinion then the blood on the jeans and the blood in the tube are one in the same.
>
> Dr. Blake: That is my opinion.

Testimony of Dr. Cleland Blake, Transcript of Habeas Hearing, pp. 116-17, Feb. 2, 1999 (emphasis added). When we add to this testimony the fact that almost all of the blood in one of the vials was spilled and cannot be accounted for, as explained below, Dr. Blake's conclusion that the blood evidence does not now support the jury verdict leaves little room for debate.

Dr. Blake arrived at his conclusion based on his theory of what constitutes normal or ex[illegible] enzymatic degradation of blood in different media; that is, whether the blood is preserved in liquid fo[illegible] test tubes or vials or whether it is dried on cloth or other material. Depending on the medium on which the

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[3] Citations to the federal Habeas Hearing will be referenced as "Testimony of [witness], Transcript of Habeas Hearing, p. ___, [date]."

blood is preserved, and the condition or state of the blood at the time it is preserved, the blood will degrade at different rates. Dr. Blake found an unexpected consistency in enzyme degradation between the liquid sample taken from Mrs. Muncey's body after her death and the five samples of what the government contends is fresh blood that stained House's blue jeans as he allegedly murdered Mrs. Muncey. Simplistically, the blood enzymes at issue here are proteins that are able to function properly only within the living human body. Once outside the body, or after the body is no longer functioning, the enzymes start to break down and lose their structure and shape and no longer function; they degrade and are said to become "denatured." Generally, "fresh" blood from a live victim that comes in contact with dry cloth is "preserved" in a different, and generally better, way than blood that is stored in a test tube.[4]

The blood tests performed by Agent Bigbee of the FBI on the victim's blood, stored in vials after being taken from her body during the autopsy, and the five samples from the defendant's jeans, preserved on the cloth of the blue jeans, looked for the presence of various enzymes (to see whether they had denatured or not) in the blood. Of the ten enzymes tested, six had conclusive results. All six enzymes matched, making it reasonable for Dr. Blake to conclude that the enzymes in the blood on the jeans degraded at the same rate as the blood in the sample taken from the victim's body and stored in glass vials or test tubes. Because they degraded at the same rate despite being "preserved" in two different media – test tube vials and cotton cloth of blue jeans – it appears that the enzymes came from the same sample, that is, the blood on the defendant's jeans came from the sample taken from the autopsy of the victim, not the victim herself when alive.

There is additional strong evidence that the sample in the vials of blood were mishandled or possibly even tampered with and intentionally spilled on the jeans. Four vials of blood were taken from the victim during her autopsy. The vials, along with other evidence, were transported by law enforcement officials between Union County, Tennessee, and the FBI Laboratory in Washington, D.C. and back to Union County. In reaching his conclusion that the blood on House's blue jeans came from the vials of blood taken from Mrs. Muncey after her death, Dr. Blake also noted that the blood evidence had been mishandled in this matter. Although not an expert on the packaging and handling of evidence, Dr. Blake's work requires him to examine evidence that has been packaged and handled by others on a regular basis. He determined in this case that the evidence had been mishandled and that blood had spilled from the vials, causing the contamination of the blue jeans. Testimony of Cleland Blake, Transcript of Habeas Hearing, pp. 50-51, Feb. 2, 1999. Dr. Blake testified that if tubes containing blood are not properly sealed, the stoppers on the tubes may come out if the blood samples become too warm. Testimony of Cleland Blake, Transcript of Habeas Hearing, pp. 51, Feb. 2, 1999.

Detective Larry Johnson, of the Knox County Sheriff's Department, also testified at the habeas hearing as to the packaging and handling of the evidence in this case. Detective Johnson is an expert witness in the area of crime scene investigation, having examined hundreds of homicides, robberies, rapes and other crimes over 30 years. Detective Johnson testified after reviewing reports and photographs of the packaging of the evidence in this case that "the packaging of the materials in the case did not meet professional standards." He testified that although each piece of evidence was separately wrapped, it was placed in one box for transport or shipment, which is not the preferred manner of packaging. He testified

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[4] One technique favored by forensic professionals is to preserve blood samples on dry cotton sheeting or cloth in order to store the samples with minimal degradation over time.

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that the best way is to put the victim's clothing in one container, the suspect's clothing in one container and biological evidence, like blood, in a different container to avoid transfer of potential evidence, such as fiber coming in contact with fiber. All evidence should be separated, labeled and sealed. Testimony of Larry Johnson, Transcript of Habeas Hearing, pp. 105-07, Feb. 1, 1999.

In this case, the testimony of TBI agents Murray and Breeding, who transported the evidence from Tennessee to the FBI in Washington, D.C., reveals that although the evidence from Mrs. Muncey's body may have been *packaged* separately, it was all transported to the FBI in Washington, D.C. in *one* box, contrary to good forensic practice. Testimony of Larry Johnson, Transcript of Habeas Hearing, pp. 104, Feb. 1, 1999. Moreover, it was the height of summer on the July day when the officers transported the material in the trunk of their car from Union County to Washington, D.C. There is no testimony that the trunk was air conditioned or that the blood samples from Mrs. Muncey were otherwise kept cool during the long trip from Tennessee to Washington, D.C. As noted above by Dr. Blake, the stoppers can blow off of blood vials if the sample becomes too warm.

Another witness, Howard Bragdon, worked for DiaClin, the private company that did the blood testing on the evidence at the request of House's attorneys in October of 1985 after it had been in the possession of the government for over three months.[5] Mr. Bragdon transported the evidence, including the Styrofoam box containing the vials of blood, from Union County to DiaClin's offices in Nashville. Testimony of Howard Bragdon, Transcript of Habeas Hearing, pp. 1-6, Feb. 2, 1999. He testified that there was dried blood on the Styrofoam box when he took possession of it. *Id.* at pp. 6-7. The photographs taken by DiaClin in October 1985 and introduced at the habeas hearing clearly show blood staining the Styrofoam container used to transport the blood.

Mr. Bragdon also testified that one of the four vials was only partially full and another was nearly empty. Yet, Agent Bigbee testified that he used only one-fourth of a vial in performing his tests at the FBI lab in Washington, D.C. Mr. Bragdon also testified that two of the vials appeared to be leaking or had leaked when he picked them up in Union County.

The documentation, or lack thereof, concerning the chain of custody of the blue jeans and Mrs. Muncey's blood samples is particularly troubling due to the evidence of possible mishandling of the evidence. The purpose of the chain of custody requirement is to "demonstrate that there has been no tampering, loss, substitution, or mistake with respect to the evidence." *State v. Braden*, 867 S.W.2d 750, 759 (Tenn. Crim. App.1993). While the state is not required to establish facts which exclude every possibility of tampering, the circumstances established must reasonably assure the identity of the evidence and its integrity. *State v. Ferguson*, 741 S.W.2d 125, 127 (Tenn. Crim. App.1987).

The necessary "integrity" is lacking here. One exhibit introduced at the habeas hearing shows the plastic bag labeled by the TBI that contained the blue jeans. Petitioner's Ex. 10-6, Habeas Hearing, Feb. 1999. However, Agent Scott of the TBI testified that he put the jeans in a *paper* bag after retrieving them from the clothes hamper at Donna Turner's house after the murder. Testimony of Charles Scott, Transcript

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[5] Despite the State's implication that it was somehow House's fault that his experts did not have a chance to examine the evidence until three months after the murder, House filed a motion in late July 1985 to gain access to the evidence gathered at the time of the murder for purposes of testing. Motion for Samples, filed July 29, 1985, Addendum No. 1, pp. 5-6.

of Habeas Hearing at p.115, Feb. 3, 1999.[6] In addition, the FBI list of evidence it received from the TBI notes that the jeans were received in a sealed *paper* bag. FBI File, Addendum No. 2, Criminal Trial Exhibits, Ex. 31, pp. 36, 49. The plastic bag bore a label with the name "Charles Scott" written on it, but that label covers part of the markings made on the bag by the FBI, indicating that the label was put on *after* the FBI did its analysis. This sequence of events makes no sense because Charles Scott was the first agent to handle the jeans when he retrieved them from Ms. Turner's house after the murder. Given the evidence that the jeans were originally placed in a paper bag, Agent Scott's label likely was moved from another place – probably the original paper bag – and put on the plastic bag at a later time. The documentation showing the chain of custody for the blue jeans is of no help in sorting out the sequence of events. I can find no subsequent records showing when or by whom the jeans were transferred from the paper bag to the plastic bag.

Finally, adding to the likelihood that the blood samples were spilled on the jeans at some point after they were removed from Ms. Turner's home, the plastic bag holding the blue jeans appeared to have blood stains on it when received by Lisa Calandro, an expert in forensic DNA analysis and biological evidence analysis hired by House. *See* Photograph of plastic bag, Petitioner's ex. 10-6, Habeas Hearing, Feb. 1999; Respondent's Ex. 21, Habeas Hearing, Feb. 1999 (same). Ms. Calandro testified that the outside of the bag tested positive for the presence of blood, but analysis to further identify its source was unsuccessful. Testimony of Lisa Calandro, Transcript of Habeas Hearing, p. 76, Feb. 1, 1999.

This mystery of how the blue jeans got from the paper bag in Tennessee to a plastic bag sometime later, the confusion in the labeling of the bag, the evidence of blood spilled inside the box containing the evidence, and the acknowledgment of missing blood demonstrate that critical evidence in this case was possibly tampered with, or, at the very least, not handled according to recognized protocol and accidentally spilled.

The testimony of Pauline Sutton also raises questions as to whether the jeans were tampered with. She noted that some of the blood stains were mixed with mud. The National Weather Service records show that it had not rained for three days prior to the murder, and photographs of the crime scene showed no mud present. There was no mud on the victim's clothing. This evidence is inconsistent with the State's contention that the mud and blood got on the jeans at the crime scene.

While the State acknowledges, and even stipulates on the record, that some of the blood taken from Mrs. Muncey's body after her death cannot be accounted for and was likely spilled, Statement of Assistant Attorney General Glenn Pruden, Transcript of Habeas Hearing, p. 115, Feb. 1, 1999, as shown by the evidence introduced at the habeas hearing, it has offered no explanation nor even shown any interest in determining what happened to the missing blood.

Unlike many cases where accusations about chain of custody problems or mishandling of evidence are made, this is not a case where an inference of mishandling of the evidence has been made with no

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[6] Clothing evidence is generally not stored in plastic bags because the bags do not "breathe" and any biologic material on the clothing will degrade faster when in a plastic bag than a paper bag. Detective Larry Johnson, an expert on the packaging and handling of evidence, testified that clothing that might contain body fluids should not be placed in plastic because the plastic tends to draw moisture and starts to break down the fluids more quickly. Testimony of Larry Johnson, Transcript of Habeas Hearing, p. 111, Feb. 1, 1999.

evidence to support such an inference or a case where there is simply a short gap in time where custody of the evidence cannot be determined. Here, both parties agree that blood was spilled or leaked from the vials. There is a blood stain on the container that held the blood samples and a blood stain on the plastic bag that contained House's blue jeans. The vials themselves clearly show that significant leakage occurred and blood is missing from at least one of the vials that has not been accounted for through testing. What has not been established is when this spillage or leakage happened or how it happened. This inability to account for the blood through either the chain of custody or testimony from an individual along that chain, and the undisputed existence of blood stains on the container that transported the blood vials eliminates the probative value of the blood evidence. Surely the facts demonstrating the lack of care in handling the evidence, when viewed in conjunction with Dr. Blake's expert testimony that the blood on the blue jeans came from the vials taken from Mrs. Muncey's body after her death, not when she was alive, would lead a reasonable juror, hearing this evidence, to have a substantial and serious doubt as to House's guilt. The Blake testimony together with the spillage creates a high probability that the blood on the House jeans came from a vial of blood.

IV. Newly Discovered Evidence That Mr. Muncey Killed His Wife

In addition to the newly discovered scientific evidence concerning the semen and blood stains, there is now strong independent evidence against Mr. Muncey as the perpetrator of the crime. There is no reason to believe that a jury would reject the testimony of the two life long residents of the Luttrell community who describe Mr. Muncey's weeping confession to them that he killed his wife accidentally while beating her. The women have no reason to fabricate, no axe to grind. Nor is there a reasonable basis for rejecting the highly incriminating testimony of two other women and the security guard at the Saturday night dance. Because the Court and the prosecution question the credibility of these witnesses and the inferences to be drawn from their testimony, we will quote their testimony in detail so that readers can make judgments for themselves.

Penny Angela Letner, a life long native of the Luttrell community, testified that there was a small gathering at the house of her sister, Kathy Parker, near the time of House's trial in 1986. At that time Mr. Muncey confessed that he killed his wife under the following circumstances:

Q. Okay. If you would, just tell His Honor, what happened at that party.

A. I came in — and we call him Bubba — he was sitting there and he was pretty well blistered. I could tell by the way he was talking.

Q. Who do you call Bubba?

A. Hubert Junior. We call him Bubba. We growed up around him. That was just a nickname for us. He was sitting there and he went to crying and was talking about his wife and her death and he was saying that he didn't mean to do it.

MS. LUSTRE: Objection.

THE COURT: Same ruling. Go ahead.

A. He said he didn't mean to do it. That she was "bitching him out" because he didn't take her fishing that night, that he went to the dance instead. He said when he come home that she was still on him pretty heavily "bitching him out" again and that he smacked her and that she fell and hit her head. He said I didn't mean to do it, but I had to get rid of her, because I didn't want to be charged with murder.

Q. What did you do, when you heard this?

A. When he said that he had to get rid of her, it scared me quite badly. I was 19 year old with a small child. I got out of there immediately. After he made those statements, I was ready to leave there.

Q. Had Little Hube been drinking that evening?

A. From the way he was acting, quite a bit. He was talking kind of stiff tongued like, but it wasn't to the point that I couldn't understand what he was saying.

Q. Was he emotional when he was telling the story?

A. He was crying. He was very upset.

Testimony of Penny Letner, Habeas Hearing Transcript, pp. 28-29, Feb. 1, 1999.

On cross-examination, she explained her reason for coming forward in 1999 to give this testimony:

Q. Did you report this to the police?

A. No. I didn't. I was 19 year old. I was kind of scared. I was frightened, you know. I didn't know how to take it. I figured me being 19 year old they wouldn't listen to anything I had to say.

Q. How is it that you came to give a statement now?

A. They was some people came and started asking questions and I answered their questions truthfully.

Q. What people?

A. It was an investigation that was ongoing for Mr. House.

Q. Do you remember who it was that came to talk to you?

A. Michael Lee was the first gentleman that I spoke with. He was the first one that questioned me.

Q. Why did you not tell Mr. Lee to get lost, essentially?

A. Because it's not right. The gentleman stood right there in my face in front of several people and owned up to doing it. It's not right for a man to be in jail for something he didn't do.

Q. What made it not right 13 years later but okay for the intervening 13 years?

A. There wouldn't nobody listen to me. Finally there was someone willing to talk to me.

Id. at pp. 31-32.

Kathy Parker, Mrs. Letner's sister, also testified as follows about Little Hube's confession and her reasons for coming forward:

Q. Do you have any recollection about anything that he said?

A. Oh, yeah, he said they had been into an argument and he slapped her and she fell and hit her head and it killed her and he didn't mean for it to happen.

Q. Was he intoxicated?

A. He was drinking real heavily, yeah.

Q. Was he emotional?

A. Very.

Q. All right. How very is very?

A. Well, he was crying and just all to pieces.

Q. All right. How long had he been there before he told you about this incident?

A. Maybe 10 or 15 minutes, not real long.

Q. Did he say what they were arguing about?

A. He had wanted to go to a dance or something or another and was wanting to go somewhere else. That is what they got into an argument over.

Q. What did you do when you heard Little Hube say he hit his wife and she died?

A. I freaked out and run him off.

Q. You freaked out?

A. I freaked out and ran him off.

Q. Okay. After the party did you tell anybody about this?

A. Not that night. The next day I went to Union County and tried to talk to some law people and —

Q. Would they listen to you?

A. Went to Union County to the Sheriff's Department. I tried to speak to the Sheriff but he was real busy. He sent me to a deputy. The deputy told me to go upstairs to the courtroom and talk to this guy. I can't remember his name. I never did really get to talk to anybody.

Q. Tried to tell them?

A. Yeah.

Q. Did you talk to your mother about it?

A. A little later on there wasn't a whole lot said about it, but she was the one that took me to the courthouse.

Q. Your mother went with you to the courthouse that day?

A. She drove me. I didn't have a vehicle.

Q. Did you know Carolyn Muncey?

A. Yes, sir.

Q. Are you aware of whether or not Little Hube had ever abused her or beat on her?

A. She was constantly with black eyes and busted mouth.

. . . .

Q. Let me ask you this. You know Little Hube?

A. Yes, sir.

Q. How long you been knowing him?

A. I dated him when I was 14 year old. I will be 42 in June.

Q You have known him a long time?

A. Yes

Q Well, have you had any disagreement with him lately, any arguments, fights?

A. No.

Q. Are you mad at him?

A. No.

Q. Why are you here today?

A. Because I don't think what has happened is right. It needs to be taken care of. An innocent man is in jail.

Q. Do you know the petitioner, Paul House?

A. No, sir.

Q. Ever met him?

A. No, sir.

Testimony of Kathy Parker, Habeas Hearing Transcript, pp. 37-39, Feb. 1, 1999.

Around two months before the murder of Carolyn Muncey, Mr. Muncey also told Hazel Miller, also a life long resident of Luttrell, that he was going "to get rid of that woman one way or the other".

Q: All right. Back prior to the death of Mrs. Carolyn Muncey, did you have occasion to see Little Hube Muncey in your residence?

A. Yes, sir, sure did.

Q. About how long before Mrs. Carolyn Muncey's death was Little Hube in your house?

A. Two, three months, something like that.

Q. What was he there for, if you know?

A. He come tried to get my daughter to go out with him.

Q. What did Little Hube say?

A. He was upset with his wife, that they had had an argument and he said he was going to get rid of that woman one way or the other.

Q. What did you say?

A. Told him he ought to go home to his wife and kids and take care of them.

Q. Did he say anything about his kids?

A. He said his mother told him she was going to help him take care of them.

. . . .

Q. Now, I take it you have known Little Hube for a while?

A. Yes. Basically about all his life.

. . . .

Q. Have you had any disagreements or arguments or fights with Little Hube or any members of his family?

A. No, he has always treated me decent.

Q. Are you all presently on the outs? Are you mad at him or anything?

A. No.

. . . .

THE COURT: All right. Where did this conversation take place?

A. At my kitchen table.

THE COURT: You said he ought to go home to his wife and children?

A. Wife and kids, yes. I thought he should.

THE COURT: What did he say to you?

A. He was going to get rid of her one way or the other. I presume he meant he was going to get a divorce.

Testimony of Hazel Miller, Habeas Hearing Transcript, pp. 47-50, Feb. 1, 1999.

In addition to the confession to Letner and Parker and the "get rid of" statement to Miller, there was additional evidence incriminating Muncey at the habeas hearing. Hubert Muncey insisted he was at the dance until it ended on Saturday night and then went home after midnight to find his wife missing. This testimony is inconsistent with the testimony of Dennis Wallace, the security guard on duty at the dance. He testified:

Q. All right. During that period of time did you see Little Hube Muncey at the dance?

A. Yes, sir, I did.

Q. And during that period of time before the dance was over did you see Little Hube Muncey leave the dance?

A. Yes, sir, I did.

Q. All right. Then subsequent to that, did you see Little Hube Muncey return to the dance?

A. Not that I can recall.

. . . .

Q. Do you remember approximately what time Little Hube Muncey left the dance that evening? When you say saw him leave, before it was over?

A. I would say around 10:00, 10:30, 9:30 to 10:30. I don't know exactly.

Q. You don't recollect now having seen him come back to the dance?

A. No.

Testimony of Dennis Wallace, Habeas Hearing Transcript, pp. 56-57, Feb. 1, 1999.

Mrs. Artie Lawson testified that she is "a good friend" of Little Hube's and that he came to see her Sunday morning to get her to help him establish an alibi for Saturday evening. This conversation on Sunday morning took place several hours before the body was found and before it became clear that Mrs. Muncey was murdered, not just missing. Mrs. Lawson testified:

A. Well, this Little Hube, he come to my house that morning on Sunday morning and he asked me if anybody come to say anything, you know, talk to me, to tell them that he was there at six o'clock.

. . . .

A. He asked me if anyone, you know, come and asked me anything to tell him that he had, that I was at the dance that Saturday night — but I was not. He said that he had eat breakfast down there [at my house] at six o'clock that Sunday morning and he did not.

Testimony of Artie Lawson, Habeas Hearing Transcript, pp. 20-22, February 1, 1999.

Hours before his wife's body was found, Muncey went to Mrs. Lawson and tried to establish an alibi for Saturday night. He in fact had no alibi. He left the dance an hour and a half early and is unable to account for his whereabouts at the very time the county coroner gave as his best estimate as the time of death. Then early the next morning before the body was discovered, he went to Mrs. Lawson in an effort to enlist her help in establishing an alibi.

The evidence of what happened at the Muncey home on Saturday evening further undermines the case against House and further incriminates Muncey. Pamela Luttrell and her husband lived across the road

from the Munceys. Mrs. Luttrell testified that Carolyn Muncey came to her house sometime around 8:00 P.M. on Saturday evening with her children and "stayed an hour or an hour and a half" and "said that Little Hube had gone to dig a grave and he hadn't come back." Testimony of Pamela Luttrell, Addendum No. 4, Vol. II, pp. 632-33. She testified that between 10:00 and 11:00 "within an hour or so after she left" with her children to go back home, Mrs. Luttrell believed she heard Little Hube's car coming back home.

> Q. Now, after she left, did you see or hear anything else that night that drew your attention to outside directly in the vicinity of Carolyn Muncey's home?
>
> A. I heard a car rev its motor as it went down the road.
>
> Q. And you had heard that sound before or you thought you had heard that sound before, hadn't you?
>
> A. Well, I have heard a sound like it.
>
> . . . .
>
> Q. And that was the impression you got that night, wasn't it, that that was Little Hube's car revving up?
>
> A. Yeah, just going by.
>
> Q. And when he'd get to the house there, he would rev up. Is that correct?
>
> A. And then keep going.
>
> Q. Now that would have been somewhere around — after Carolyn had left and before you went to bed. You went to bed within an hour or so after she left?
>
> A. Uh, huh (meaning yes by sound), I was on my way to bed when I heard it.

Id. at pp. 641-42.

Mrs. Luttrell testified that the car was coming from the direction in which Muncey's car would have traveled coming from the dance, from Kitts Road toward Tazewell Pike and "revved up" when he got to the house, as he usually did. Mrs. Luttrell's testimony is consistent with the testimony of Constable Wallace that Muncey left the dance well before it ended. It is inconsistent with Muncey's testimony that he stayed at the dance until it ended. Together with the testimony of Wallace, Mrs. Luttrell's testimony places Muncey at home between 10:00 and 11:00 that evening — the approximate time that the coroner testified that the murder occurred.

In addition, Pamela Luttrell's testimony about what happened later that evening is also completely inconsistent with the theory that House came to the Muncey home on foot during the evening and abducted Carolyn and murdered her. Luttrell testified that Little Hube, along with the two children, Laura and Matt, came to her home at about 1:00 A.M. that evening and told her Carolyn was missing. At that time, Luttrell

questioned Laura in detail about what had happened that evening after she got home from her earlier visit to Luttrell's house. Laura said that she and her younger brother had gone to sleep:

> Q. Mrs. Luttrell, Laura talked with you after she discovered her mother missing?
>
> A. Yes.
>
> Q. Did she tell you whether or not she woke up one time or two times, as far as different people coming to the house asking questions?
>
> A. Well, she said she heard a horn blow, she thought she heard a horn blow, and somebody asked if Bubbie was home and her mama, you know, told them — no. And then she said she didn't know if she went back to sleep or not, but then she heard her mama going down the steps crying and I am not sure if that is when she told me that she heard her mama say — Oh, God, no, not me, or if she told me that the next day, but I do know that she said she heard her mother going down the steps crying.

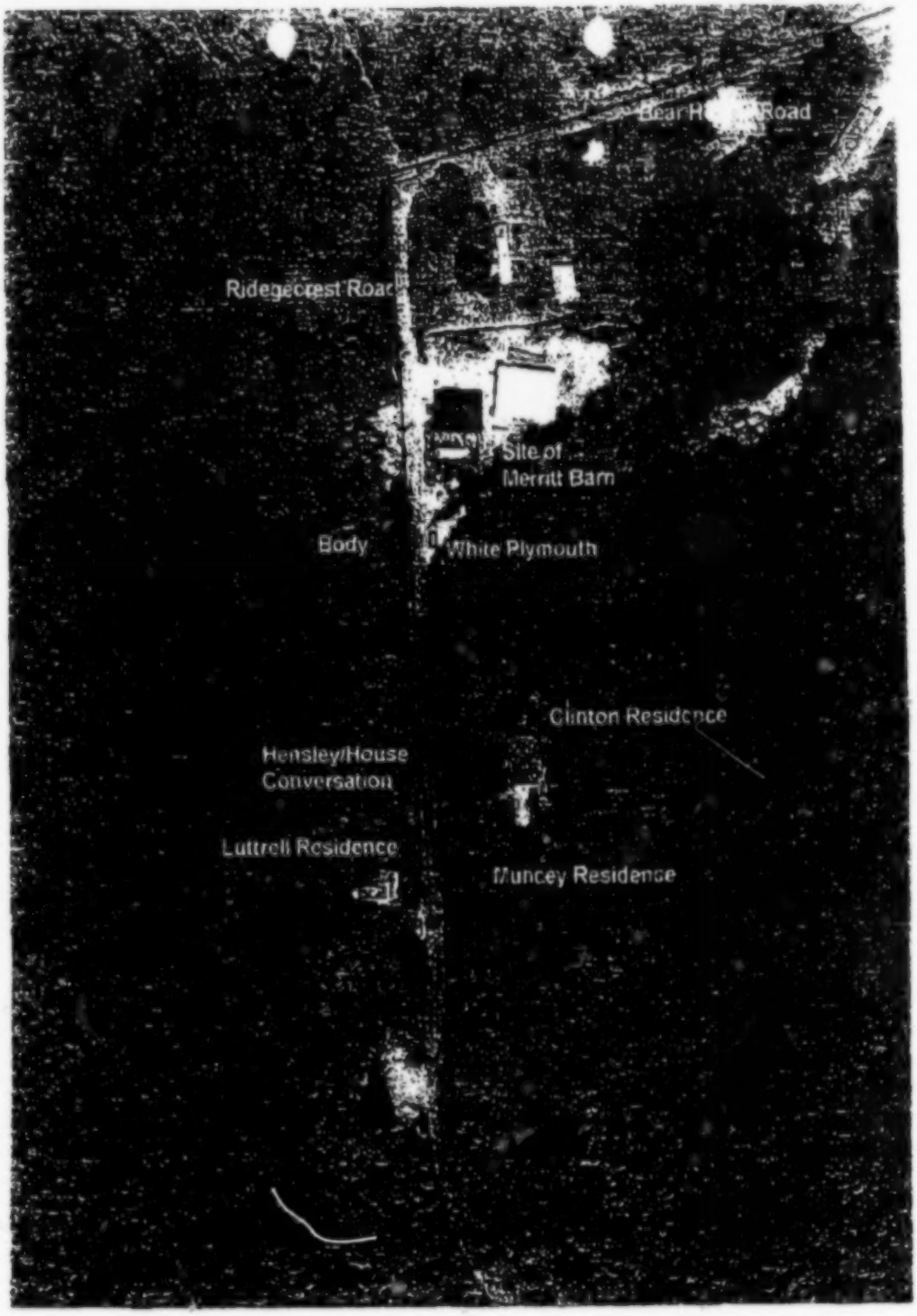
Id. at 658.

Luttrell further testified that Laura told her that the man who asked for "Bubbie" after the horn blew sounded like her grandfather, whom she called "PawPaw." Luttrell said that "Bubbie" was a family name not normally used by others in the community who called Muncey "Little Hube." Laura said nothing in answer to Pamela Luttrell's questions that evening about anyone saying during the evening that Little Hube had been involved in an automobile accident. This evidence seems completely inconsistent with the State's theory that House walked almost two miles at around 10:30 on Saturday evening to the Muncey home where he abducted and murdered Carolyn Muncey. It is clear that House did not have a car that evening, did not blow a car horn, would not have called Little Hube "Bubbie," did not enter the Muncey home, wake up the Muncey children or talk to Carolyn Muncey within the ear shot of the children. In the contemporaneous, immediate conversation between Mrs. Luttrell and Laura, Laura said that she heard a horn blow, someone ask for "Bubbie," who was not there and that person "sounded like PawPaw," who called Little Hube by his family nickname, "Bubbie."

Although it is true, and highly incriminating, that House left his home on foot during a similar time on Saturday evening and returned with bruises and in a disheveled condition, Pam Luttrell's testimony that Little Hube came home around 10:30 and Laura's testimony about the homblowing and the "PawPaw" voice leaves no room for the State's theory that House walked two miles to the Muncey house and murdered Carolyn Muncey and then walked two miles home within a relatively short period of time. The inference that he murdered Carolyn Muncey from the fact that he left home on foot on Saturday evening and returned with bruises and in a disheveled condition cannot be reconciled with Mrs. Luttrell's testimony about when Little Hube came home and Laura's answers to her questions about what happened that evening. Mrs. Luttrell's testimony is consistent with the testimony of Constable Wallace that Mr. Muncey left the dance at about 10:30 P.M. as well as Muncey's confession, his previous threats and brutal treatment of his wife and his attempt to establish an alibi through Mrs. Lawson on Sunday morning.

This particular highly incriminating evidence about House's returning home in a disheveled condition on Saturday night with "blood on his pants," and his semen on the victim's night gown, however,

does go a long way in explaining the jury's capital conviction of House, a stranger in a community with a record of sexual assault, especially when it did not have any of the newly discovered evidence undermining the prosecution's theory of the case. In the absence of the newly discovered evidence, the State's theory seemed convincing. In light of the new evidence, it is no longer tenable. In my view, it is more probable than not that House is innocent of the homicide and that Mr. Muncey killed his wife, as he confessed. Six witnesses — Letner, Parker, Miller, Wallace, Lawson, and Luttrell — now provide either direct or circumstantial evidence that Mr. Muncey killed his wife. He had a motive. The motive attributed to House no longer exists.


Bear H Road
Ridgecrest Road
Site of
Merritt Barn
Body
White Plymouth
Clinton Residence
Hensley/House
Conversation
Luttrell Residence
Muncey Residence

V. The Unreliability of the Hensley Testimony

The preceding map of the area where Carolyn Muncey's body was found is necessary to understand the weakness of the testimony of the one remaining witness, Billy Ray Hensley, who gave highly incriminating evidence at the 1986 trial. The opinion of our court accurately characterizes Hensley's testimony as a series of "inconsistent statements about when and where he saw House on Ridgecrest Road" supposedly "carrying a black rag." The prosecution claimed at the trial that the "black rag" was House's blue shirt which he had lost the night before and had just retrieved after climbing down the embankment where he had left Carolyn Muncey's body.

House explained his presence near Muncey's house at the habeas hearing. He testified that he regarded "Little Hube" and Carolyn Muncey as friends and he heard on Sunday morning that she was missing. He borrowed the car of his girl friend, Donna Turner, and drove down to the area on Ridgecrest Road where he knew they lived. This testimony is corroborated by other witnesses. He missed the driveway which was hidden in trees and undergrowth and turned around and parked the car near Merritt's barn and walked back up about 90 feet and found the driveway and saw that Muncey's car was not at home. He walked back down Ridgecrest Road to his car:

Q. You went back to your car. Did you get in?

A. Yes.

Q. And start driving?

A. I got in, pulled out. I was going to — between Little Hube's and Tazwell Pike there is another dirt road like a dead end.

Q. Somewhere off the chart?

A. Yeah, it is on his side where he lived. It is on that side of the road. It is just a dirt road, dead end. Bill Silvey had told me that people went to drink down there. Donna had told me that people went to drink down there. Donna had told me she had seen him drinking. I thought why not look there. As I was going up there, then Bill Hensley, I guess that is the name, was in the car. I saw him and he was coming towards me. I was going toward him. I waved him over. He stopped.

Q. He was in the little blue car?

A. Right. I asked him if he knew Little Hube. He said he did. Asked him if he had seen him, he said he hadn't, didn't see him around there anywhere.

Testimony of Paul House, Transcript of Habeas Hearing, p. 91, Feb. 3, 1999.

Hensley had also testified at the 1986 trial that House while in his car waved him to stop at that location on Ridgecrest Road and told him he was looking for Little Hube.

The incriminating part of Hensley's testimony at the trial was that as he was coming down Bear Hollow Road approximately 100-150 feet from its intersection with Ridgecrest Road he saw House coming up an embankment where the victim's body was later found:

> Q. Now, you say that as you were coming down, we will call this Bear Hollow Road, just so the jury and everybody will know the roads we are talking about. Before you got to this intersection, before you turned left [onto Ridgecrest Road] to go to Tazewell Pike, you say you saw my client, Mr. House?
>
> A. Yes, sir.
>
> Q. All right. You weren't at the intersection, were you?
>
> A. No, sir.
>
> Q. In fact, you have previously told us you were somewhere between 100 and 150 up from the intersection, weren't you — 100 to 150 feet up from the intersection?
>
> A. Yes, sir.

Testimony of Billy Hensley, Addendum No. 4, Vol. V, p. 717.

After Hensley turned onto Ridgecrest road, he did not see House, according to his testimony:

> Q. From the time that you made your left-hand turn, what was the first thing you saw in relationship to Mr. House or his vehicle?
>
> A. I saw his vehicle.
>
> Q. And at no time after you made your left-hand turn could you say where Mr. House was in relationship to the bank, the side, the road or anywhere in there, is that correct?
>
> A. No sir, I could not.

Id. at 719-20.

There are two serious problems with this testimony. It is directly contrary to the statement Hensley gave to the police on the Sunday evening after the victim's body was found. In that statement he said that he turned left at the intersection and he:

> travelled about 500 feet on Ridgecrest Road when I saw about a '66 or '67 white Plymouth sitting on the left side of Ridgecrest Road and I saw a man, later identified to me as Paul Gregory House enter the roadway from the right-hand side of the road. He was coming up over the bank, and he had a black rag in his hands and he was wiping his hands. I drove on by the man and went to Little Hube's driveway . . .

Statement of Billy Ray Hensley taken by TBI on July 14, 1985, Addendum No. 1, p. 139; *see also* Testimony of Billy Hensley, Addendum No. 4, Vol. V, p. 729.

Hensley testified on cross-examination about the statement:

Q. Did you tell the police that on Sunday at 10:45 p.m., did you talk to them Sunday night, the same night -

A. Oh, yes.

Q. And you gave them that statement, did you not?

A. Yes, sir.

Testimony of Billy Hensley, Addendum No. 4, Vol. V, p. 730.

This statement that Hensley was at the embankment and saw House "coming up" is clearly contrary and unreconcilable with his trial testimony that he saw House 100-150 feet up Bear Hollow Road and did not see him after he made the turn onto Ridgecrest Road. The cross-examination of Hensley revealed not only these contradictions in his statements about where he was when he claimed to see House, as our court's opinion recognizes, but also it revealed the fact that as Hensley drove down Bear Hollow Road that various obstructions like Merritt's barn and trees would have prevented him from seeing anyone in the vicinity of the embankment where he claimed to have seen House. The map itself, the testimony and photographs, show conclusively that Hens' could not have seen House from that location on Bear Hollow Road.

Hensley's contradictory and implausible testimony is the last incriminating straw in the case against House. Like the semen evidence and the blood evidence it is no longer probative. It is a slender reed indeed on which to hang House's conviction and death sentence.

VI. Conclusion

This is a death penalty case based purely on circumstantial evidence in which the prisoner has maintained his innocence during 20 years of incarceration. I would hold that he has easily met the requirements necessary to travel through the gateways of actual innocence of both the death penalty and the homicide by completely disproving the motive for the crime and the aggravator (rape) and through persuasive evidence undermining the main circumstances that gave rise to his conviction (the blood evidence and the Hensley testimony). This body of evidence alone meets both the *Sawyer* standard, that petitioner show by clear and convincing evidence that but for constitutional error at trial, no reasonable juror would have found him eligible for the death penalty and the *Schlup* standard, that petitioner show that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. The Court stated in *Schlup* that since gateway claims assert constitutional error at trial, these "convictions may not be entitled to the same degree of respect" as convictions that are the product of error free trials. *Schlup*, 513 U.S. at 316. At a minimum, based on the newly presented evidence we should allow House to pass through the gateway so that his constitutional claims of ineffective assistance of counsel at the guilt and penalty phases of the case become cognizable again. The remedy for passing the gateway test is a remand for further proceedings on the underlying constitutional claim.

In this case, however, I would go further and issue the writ of habeas corpus because the prisoner has affirmatively established a free-standing case of actual innocence. This is that rare and extraordinary case where petitioner has provided "a truly persuasive demonstration of 'actual innocence'" that should free the prisoner immediately. *Herrera*, 506 U.S. at 417. Through extremely persuasive and affirmative evidence that Mr. Muncey killed his wife, House has shown that it is highly probable that he is completely innocent of any wrongdoing whatever. There is no reasonable basis for disbelieving the six witnesses who now incriminate Mr. Muncey as the perpetrator of the crime. The most compelling part of this new testimony involves his confession to the murder in front of two witnesses who have no connection to House and no bias against Mr. Muncey. Furthermore, before his wife's body was even located, he solicited a neighbor to fabricate an alibi on his behalf. He was heard returning home around the time of the murder. And considering his history of domestic violence and his wife's plans to leave him he had a motive to kill. In contrast, there is no evidence of a motive for House. All of the state's physical evidence, both blood and semen, allegedly tying House to the murder, has been effectively rebutted. The new body of evidence as a whole so completely undermines the case against House and establishes a persuasive case against Muncey that, had it been presented at trial, no rational juror could have found evidence sufficient for conviction. The new evidence so completely turns the case around that the proof is no longer constitutionally sufficient to warrant a conviction or imposition of the death penalty. Thus House should be immediately released.

Justice Scalia has referred to the question before us of actual innocence as death penalty's most "embarrassing question," a question he hoped "with any luck we [the Supreme Court] shall avoid ever having to face" in a "convincing" case. *Herrera v. Collins*, 506 U.S. at 428. Justice O'Connor has referred to this "embarrassing question" as a serious current problem: "If statistics are any indication, the system may well be allowing some innocent defendants to be executed." Speech to Women Lawyers in Minnesota, July 2, 2001.

This case and the few empirical studies that we have reinforce Justice O'Connor's view that the system is allowing some innocent defendants to be executed. *See* Radelet & Bedau, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21-179 (1987) (includes tables and summary description of numerous capital cases in which innocent defendants were probably executed); Zimming, *The Contradictions of American Capital Punishment* 149-178 (2003) (summary of the studies, including study by Death Penalty Information Center describing 98 prisoners fully exonerated after time on death row between 1973 and 2001).

High on the list of the causes for mistakes are the kinds of errors we see in this case: the misinterpretation or abuse of scientific evidence, the adverse inferences drawn from the prior record of a defendant, particularly one who is a stranger in the local community, the failure of counsel to uncover (until it is too late) witnesses who could exonerate the defendant, and the existence of one or more other suspects with a motive to commit the offense. Once the initial trial and appeal have occurred, it is clear from the studies that the state, and its officials who have prosecuted, sentenced and reviewed the case, are inclined to persevere in the belief that the state was right all along. They tend to close ranks and resist admission of error. Intelligent citizens who strongly believe in the reliability of the capital sanction are also inclined to persevere in the belief that a case raising the "embarrassing question" will never really arise and close ranks with the state in resisting the admission of error. This case is a good example of how these errors can lead to the execution of a defendant who is actually innocent.

DISSENT

RONALD LEE GILMAN, Circuit Judge, dissenting. After reading Judge Norris's majority opinion and Judge Merritt's dissent, I am convinced that we are faced with a real-life murder mystery, an authentic "who-done-it" where the wrong man may be executed. Was Carolyn Muncey killed by her down-the-road neighbor Paul House, or by her husband Hubert Muncey? The evidence at House's state-court trial clearly pointed to him as the perpetrator, highlighted by the physical evidence of the semen and the blood. But the evidence at House's habeas corpus hearing before the district court just as clearly pointed to Hubert Muncey as the guilty party, highlighted by Muncey's confession of guilt to two female acquaintances, the uncontroverted fact that the semen found on his wife's clothing turned out to be his own, and the considerable doubt cast on how the victim's blood came to appear on House's blue jeans.

At the end of the day, I am in grave doubt as to which of the above two suspects murdered Carolyn Muncey. I am also puzzled as to why more of my colleagues are not similarly in doubt after evaluating the well-written but diametrically opposed opinions by Judges Norris and Merritt. Be that as it may, the question becomes what is a federal judge to do when faced with such grave doubt? The United States Supreme Court, fortunately, has provided an answer in the case of *O'Neal v. McAninch*, 513 US. 432 (1995), a case that incidentally arose out of the Sixth Circuit. Its key holding is as follows:

> We repeat our conclusion: When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had "substantial and injurious effect or influence in determining the jury's verdict," that error is not harmless. And, the petitioner must win.

Id. at 436.

The Court in *O'Neal* also defined the term "grave doubt," stating that "[b]y 'grave doubt' we mean that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id.* at 435. Finally, the Court noted that

> our conclusion is consistent with the basic purposes underlying the writ of habeas corpus. As we have said, we are dealing here with an error of constitutional dimension—the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person.

Id. at 442.

The risk of an unreliable trial outcome is precisely what we are dealing with in the case before us. For the reasons well-documented in Judge Merritt's dissenting opinion, I believe that House has passed through the *Schlup* "actual innocence" gateway and is entitled to our consideration of his constitutional claims on their merits. On the other hand, I disagree with Judge Merritt's conclusion that the proof in favor of House is so strong that we should issue an unconditional writ of habeas corpus.

The proper disposition of this case, in my opinion, is to issue a conditional writ that would free House unless he is provided a new trial by the state of Tennessee. *See Castleberry v. Brigano*, 349 F.3d

286, 294 (6th Cir. 2003) (granting a conditional writ of habeas corpus to vacate the defendant's conviction and sentence unless the state commenced a new trial against the defendant within 90 days). A new trial would allow the jury to assess House's guilt or innocence free from the erroneous introduction of the semen evidence, with full knowledge of the controversy surrounding the blood evidence, and with the benefit of the testimony implicating Hubert Muncey. Under circumstances where we face the execution of a man who might well be innocent, I believe that our system of justice demands no less.

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Paul Gregory House, *Petitioner-Appellant,* *v.* Ricky Bell, Warden, *Respondent-Appellee.*	No. 00-6136

Appeal from the United States District Court

for the Eastern District of Tennessee at Knoxville.

No. 96-00883--James H. Jarvis, District Judge.

Argued: June 12, 2002

Decided and Filed: November 22, 2002

Before: MARTIN, Chief Circuit Judge; MERRITT, BOGGS, NORRIS, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Stephen M. Kissinger, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. **ON BRIEF:** Stephen M. Kissinger, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, Michael E. Moore, Paul G. Summers, TENNESSEE ATTORNEY GENERAL'S OFFICE, CIVIL LITIGATION & STATE SERVICES DIVISION, Nashville, Tennessee, for Appellee.

MERRITT, J., delivered the opinion of the court, in which MARTIN, C. J., DAUGHTREY, MOORE, COLE, and CLAY, JJ., joined. BOGGS, J. (pp. 22-35), delivered a separate dissenting opinion, in which NORRIS, SILER, and BATCHELDER, JJ., joined. GILMAN, J. (p. 36-37), also delivered a separate dissenting opinion.

OPINION

MERRITT, Circuit Judge. In this death penalty case from Tennessee, the habeas petitioner presents a strong claim of "actual innocence" or "miscarriage of justice," as we will outline below. The Supreme Court has assumed that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant habeas relief *if there were no state avenue open to process such a claim.*" *Schlup v. Delo* 513 U.S. 298, 314 n. 28 (1995)(*quoting Herrera v. Collins*, 506 U.S. 390, 417 (1993)(O'Connor, J., concurring)(emphasis added). Justice O'Connor has referred to such an execution as a "constitutionally intolerable event." 506 U.S. 417. As a matter of traditional comity and respect for our colleagues on the Supreme Court of Tennessee, we therefore certify certain questions to that Court in order to ascertain whether there remains a "state avenue open to process such a claim" in this case. In both capital and non-capital habeas cases, the United States Supreme Court has certified in similar situations important questions of state law which "would assist in framing the precise federal constitutional issues presented." *Zant v. Stephens*, 462 U.S. 862, 870 (1983). For a recent certification by the Supreme Court to the Supreme Court of Arizona in a death case, *see Stewart v. Smith*, 534 U.S. 157 (2001). We will follow that pattern of certification in this case.

The petitioner, Paul House, has been sentenced to death on the basis of a set of facts that now turns out to be false in significant respects. The prosecution's theory of the case, as argued and no doubt as accepted by the jury, was that House raped the victim and then concealed the rape by murdering her. DNA evidence has now conclusively shown that the semen introduced at House's trial to prove his sexual assault was not his semen but rather the semen of the victim's husband. In addition, two other significant events have occurred since the death penalty was imposed to cast doubt on the accuracy of the jury's verdict: first, the testimony of two independent witnesses that the victim's husband admitted that he, not the defendant, killed his wife; and second, the Assistant Chief Medical Examiner of the State of Tennessee has now concluded that the blood found on House's blue jeans was identical to the victim's blood in the vials obtained during autopsy and not consistent with blood that came from the victim at the time of the murder. As the Tennessee Supreme Court explained in reviewing House's conviction, House "never confessed to any part in the homicide, and the testimony linking him to it was circumstantial." *State v. House*, 743 S.W.2d 141, 143 (1987).

I.

A. House's Trial

The dead body of Carolyn Muncey, a resident of rural Union County, Tennessee, was found on the afternoon of July 14, 1985, lying partially concealed in a brush pile at the bottom of a wooded embankment within 100 yards of her home. The previous evening, Mrs. Muncey and her two children had visited a neighbor and left at about 9:30 p.m. to return home. Muncey's older child, ten year old Laura,(1) testified at trial that she was awakened late that evening by the sound of a car horn. She testified that she heard a deep voice that sounded like her grandfather asking about her father. The same voice told her mother that her father had been in a car wreck near the creek. Laura further stated that she heard her mother sobbing or crying as she left the house. When her mother did not return, the two children went to look for her at neighboring homes. Not finding her, they returned home and

waited until their father Hubert Muncey arrived. Discovering that his wife was missing, he took the children back to the home of the neighbor they had visited earlier and then called for members of his family to look for his wife.

When the body of Carolyn Muncey was discovered the next afternoon, she was dressed in her nightgown, housecoat, and underclothing. Her body had significant bruises, and there were abrasions indicating a physical struggle. There was also evidence of attempted strangulation. According to Dr. Carabia, a forensic pathologist, a blow to her left forehead resulting in a concussion and hemorrhage to the right side of her brain caused her death. Carabia also testified at trial that the victim was probably knocked unconscious by the blow to the head, and died within an hour or two. He estimated the time of her death as between 9 and 11 p.m. on Saturday, July 13, but emphasized that it was a rough estimate.

The testimonial evidence presented at trial implicated both the defendant and the victim's husband, Hubert Muncey. Muncey's alibi for the night of July 13 was that he spent the evening at the weekly C & C Recreation Center community dance and did not leave until midnight. Several individuals confirmed that he was at the dance, but no one confirmed his presence there late in the evening. The following morning Muncey went to the house of a neighbor, Artie Lawson, and asked her to lie for him as an alibi witness and say that she had seen him at the dance around midnight. The record shows that at the time of the murder Mrs. Muncey and her husband had been having marital difficulties. He had been physically abusing her and she had been contemplating leaving him. Muncey's history of abusing his wife was well-known within the local community, and he acknowledged that he "smacked" his wife on more than one occasion.

The testimonial evidence presented at trial also implicated House. There was evidence showing that he was acquainted with Mr. and Mrs. Muncey and had been with them socially on a few occasions, but there was no evidence to indicate that House was aware of the Muncey's marital situation, or that there had been any previous romantic or sexual relationship between him and the victim.

In addition, on the day following the victim's disappearance, Billy Ray Hensley, a close friend of Hubert Muncey, saw Paul House on Ridgecrest Road near the site where Mrs. Muncey's body was later found concealed in the underbrush. According to Hensley, House emerged from the embankment where the body was found and was wiping his hands with a dark cloth. Hensley spoke briefly with House and left the scene. Later Hensley and a friend returned to the scene, and went to the point where he had purportedly seen House emerge from the embankment. Looking down the bank, they found the partially concealed body of Mrs. Muncey.

House admitted that he had been in the area but denied that he had seen the body of Mrs. Muncey or had any knowledge of its presence. In addition, the dark rag which he had been using when first seen was never produced. It was the theory of the State, however, that this was a dark tank top which House was shown to have been wearing on the previous evening. Hensley's testimony that he saw House emerging from the embankment was partially discredited at trial by his own statement that he saw House from about 500 feet down Ridgecrest Road, a location where the defense proved by photographic evidence that it would have been impossible for House to have been seen down the embankment.

In the days following the homicide, House gave two statements to investigating officers in which he denied being involved in the homicide. In both of these statements he stated that he had been at the trailer of his girlfriend Donna Turner the entire evening of July 13 and that he had not left until next afternoon when he went to look for Hubert Muncey after learning of the disappearance of the latter's wife. Ms. Turner initially corroborated his alibi, but later modified her testimony to state that he had been in the trailer until about 10:45 p.m. at which time he left to take a walk. She stated that he did not take her automobile.(2) When he returned an hour or so later, he was panting, hot and exhausted. He was no longer wearing either his blue tank top or his tennis shoes. The shoes were later

found in an area different from the place where House told her he had lost them, but did not have blood stains on them. House told Ms. Turner that he had thrown away the navy blue tank top because it had been torn when he was assaulted by some persons who tried to kill him.

At trial, three key pieces of physical evidence implicated House. First, House had numerous scratches and bruises on his arms, hands and body, with an especially significant bruise on the knuckle of his right ring finger. House explained that these injuries had been sustained innocently earlier during the prior week, but when Ms. Turner was called as a witness, she said that she had not observed them prior to the evening of July 13.

Second, investigators discovered a pair of blue jeans that Paul House had been wearing on the night of the murder, in the bottom of the clothes hamper at Ms. Turner's trailer. These trousers were later determined to be bloodstained, and the State produced scientific evidence that the stains were human blood having characteristics consistent with the blood of Mrs. Muncey and inconsistent with House's own blood. Scientific tests also showed that the fibers found on the clothing of the victim were blue jean fibers. Third, investigators found spots of semen stain on the victim's nightgown and underclothing. Scientific tests showed that the semen came from a so-called "secretor," a class of males whose semen contains evidence of their blood type. In addition, the State introduced evidence that Paul House was a "secretor" and that the semen found on the victim's underclothes was of the same blood type as House.

The State's theory at trial was that House had lured the victim out of her house late at night with the intention of raping her and murdered her in the process. To support their theory, the State introduced into evidence and then emphasized the semen evidence in order to promote a jury inference that House had raped her. At trial, in its closing rebuttal, the State presented the following argument concerning House's motive:

> Now you may have an idea why he did it. The evidence at the scene which seemed to suggest that he was subjecting the lady to some kind of indignity, why would you get a lady out of her house, late at night, in her night clothes, under the trick that her husband has had a wreck down by the creek? Why is it that you want to get her down by the creek?.... [I]t is either to keep her from telling what you have done to her, or it is that you are trying to get her to do something that she nor any mother on that road would want to do with Mr. House .... and you kill her because of her resistance.

Tr. Trans. Vol. IX, p. 1302-03. The semen evidence fit the State's theory of the murder. In light of the State's theory and the testimonial and physical evidence, the jury convicted Paul House of first-degree murder and sentenced him to death. Citing the prosecution's claim that the evidence showed that "on her nightgown and underclothing some spots of semen stain from a male secretor of the same general type as appellant," the Tennessee Supreme Court upheld House's conviction and the imposition of the death penalty. 743 S.W.2d 143.

B. Newly Discovered Evidence

At the habeas hearing in federal court, House presented three important pieces of newly discovered evidence not considered by the jury at trial. First, he showed that he did not rape the victim. At the habeas hearing, DNA expert Lisa Calandro offered undisputed evidence that eliminated House as a potential donor of the semen. Ms. Calandro concluded that, based on the DNA of the semen, the victim's husband was the donor of the semen. In addition, there was no other physical evidence supporting rape or attempted rape of the victim. There was no evidence of forced penetration, the victim's clothing was not ripped or removed, and there were no bruises on the victim indicating an attempted rape. The State seems now to concede these facts.

Second, there are two independent accounts of Hubert Muncey's confessing to killing his wife that were not considered by a jury, and the statement of a third witness that Muncey had threatened to kill

his wife. At the habeas trial, defense witnesses Kathy Parker and Penny Letner both testified that in the days after his wife's death, Hubert Muncey confessed to accidentally killing his wife. They both stated that he was crying about his wife and her death saying that he didn't mean to do it. According to the witnesses, Muncey had come home from the dance and gotten into an argument with his wife. He said that he "smacked her and that she fell and hit her head." Adding further credence to their testimony was the statement of Hazel Miller at the habeas trial that Mr. Muncey told her that he was going to get rid of his wife a few months before her death.

Third, the blood evidence introduced at trial has been called into question by new evidence presented by the defendant at the habeas hearing. Four vials of blood were taken from the victim when an autopsy was performed after her death. The vials were sent to the FBI lab for analysis. Defense expert Dr. Cleland Blake, Assistant Chief Medical Examiner for the State of Tennessee, reached the conclusion that the blood on House's jeans came from one of the vials of blood taken from the victim's body, not from her body at the time of the murder. His conclusion was based on his theory of enzymatic degradation. When FBI Agent Paul Bigbee initially tested the blood from Ms. Muncey's body and the blood found on Paul House's jeans, he found a clear match, revealing that the blood on his jeans belonged to the victim. Blake, however, found that upon closer examination, there was consistency in enzyme degradation between the sample from Ms. Muncey's body and the five samples from the jeans.

Blake's testimony is as follows: enzymes are proteins which have a complex molecular structure. There are many types of enzymes which act as catalysts for cellular activity. Their fragile structure is only maintained by the proper environment provided in the human body. Over time, the chemical bonds of enzymes break and they lose their structure and shape and become inactive, i.e., they degrade and are said to be "denatured." Agent Bigbee performed tests on the victim's blood and the five samples from the defendant's jeans. Agent Bigbee looked for the presence of various enzymes – to see whether they had denatured or not – in the blood from the test. Of the ten enzymes tested, six had conclusive results. All six enzymes matched. Analyzing the results of Bigbee's tests, Dr. Blake concluded that the enzymes in the blood on the jeans changed shape and degraded at the same rate as the blood in the sample taken from the victim's body after her death. Because they degraded at the same rate despite being in two different media, it appears that the enzymes came from the same sample, that is, the blood on the defendant's jeans came from the one of the vials of blood taken from the victim. The blood on the jeans did not come from the victim at the time that she was assaulted.

In addition to the similarity in enzymatic activity, House presented evidence suggesting that the sample in the vials of blood may have been tampered with or spilled onto the blue jeans. As Dr. Blake noted, there was no unbroken chain of custody. Larry Johnson, an expert in crime scene investigation, similarly stated that "the packaging of the materials in the case did not meet professional standards." House also showed that there was blood missing from the sample taken - one of the four vials was empty and another is only half-full despite Agent Bigbee's testimony that he used only one-fourth of a vial in performing his tests at the FBI lab. House then introduced the photograph of the styrofoam container clearly showing that blood spilled in the container and that the tape on the container was mysteriously cut and retaped contrary to standard procedure. The label on the container said it contained the semen and the blood evidence, but it turned out that the semen evidence was shipped separately. Also, House noted that the location of the blood spots on the jeans was odd. The five spots were found on the outside left leg, on the inside left thigh, on the *inside* right pocket, outside the right pocket, and on the right cuff, respectively.

The testimony of the State's blood spatter expert Pauline Sutton also raised questions as to whether the jeans were tampered with. She noted that some of the blood stains were mixed with mud. The National Weather Service records show that it had not rained for three days prior to the murder, and photographs of the crime scene showed no mud present. Lastly, there was no mud on the victim's nightgown. All of this evidence raises serious questions as to how the mud got on the jeans.

C. Aggravating Factors

At sentencing, the jury found that the State proved three of the statutory aggravating factors. They were (1) the homicide was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death; (2) it was committed while House was committing or attempting to commit or fleeing from the commission of rape or kidnapping; and (3) House had previously been convicted of a felony involving the use or threat of violence to the person. T.C.A. §§ 39-13-204(i)(5), (7), and (2).

The undisputed DNA evidence that shows that House did not rape the victim seriously affects the first and second aggravating factors. The first aggravating factor states that the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death. The primary evidence for this aggravator that could constitute "torture" beyond the killing was the State's rape evidence.

The second aggravating factor alleged is that the crime was committed while House was committing or attempting to commit or fleeing from the commission of rape or kidnapping. In the jury instructions, the state trial court defined kidnapping as "the offense of forcibly or unlawfully confining, inveigling, enticing away another with the intent of causing him to be secretly confined or imprisoned against his will." Tr. Trans. at 1449. Although House purportedly lured the victim out of her house, her body was found within yards of her doorstep the following day. Outside of the evidence of sexual assault, the evidence that House confined or imprisoned the victim is remote. Thus, this aggravator is also undermined by the new DNA evidence.

In proving the third aggravating factor at the sentencing phase of the defendant's trial, the State introduced House's prior conviction by putting the defendant's parole officer, Guy Marney, on the stand. He testified that House was on parole, having been convicted in Utah of aggravated sexual assault. Marney also noted that the defendant's sentence had been from five years to life. On direct appeal, the Tennessee Supreme Court found that the admission of this evidence was error:

> In proving the prior conviction of the appellant at the sentencing hearing, the State adduced evidence as to the extent of his sentence and the fact that he was on parole. The State concedes that this testimony was irrelevant to any statutory aggravating circumstance or to any mitigating factor and that error was, therefore, committed. Under all of the circumstances, however, in our opinion the error was harmless beyond a reasonable doubt. As previously stated, three aggravating circumstances were shown, and there was almost minimal proof of any mitigating factor, so that any error with respect to this issue, in our opinion, could not have affirmatively affected the results of the hearing.

State v. House, 743 S.W.2d 141, 147 (Tenn. 1987). Thus, the Court's opinion appears to preclude the use of this aggravator but allows the judgment to stand based on the rape evidence which was sufficient to establish the other two aggravators. The State had argued at its closing at sentencing that House's behavior was repetitive, having committed a prior sexual assault followed by the rape and murder of the victim:

And I say to you that if a person who does that [rapes and kills the victim], having been shown to have committed a violent crime, an aggravated sexual assault previously, then that is a person that in order to protect ourselves, we must consider the death penalty.

Tr. Trans. at 1437.

D. The Effect of the DNA Evidence on the Element of "Malice Aforethought"

In addition to the questions raised by the DNA evidence concerning the aggravating factors, the DNA evidence raises a serious issue as to whether Paul House is guilty of first degree murder. At the

time of the defendant's trial, Tennessee law defined murder as an unlawful killing "with malice aforethought, either express or implied." Tenn.Code Ann. §§ 39-2-201 (1982) [repealed]. If the murder was "perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious and premeditated killing" or was committed during the commission of a felony, the killing constituted first degree murder. *Id.* at §§ 39-2-202(a) [repealed]. All other murders were deemed second degree murder. *Id.* at §§ 39-2-211(a) [repealed]. The Tennessee Supreme Court further explained the elements of first-degree murder as follows:

> To convict a defendant of murder in the first degree, there must be an evidentiary basis for a conclusion by the jury that the killing was willful, deliberate, malicious and premeditated. All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. And, if a weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, malice will be presumed from the use of the weapon. Deliberation and premeditation involve a prior intention or design on the part of the defendant to kill, however short the interval between the plan and its execution. It is sufficient if only a moment of time elapses between the plan and its execution as long as the jury can conclude from the evidence that there was some appreciable interval, however small. And, whether premeditation is present in a given case is a question of fact to be determined by the jury from all circumstances of the case.

Sikes v. State, 524 S.W.2d 483, 485 (Tenn.1975)(citations omitted). Thus, to convict a defendant of first-degree murder, the State must prove beyond a reasonable doubt that the defendant killed the victim, and did so with malice aforethought, premeditation, and deliberateness. *Id.*

The Tennessee Supreme Court has made it clear that when a jury makes "a determination of culpable mental states, such as premeditation ..., [it] must [often] be inferentially made from the circumstances surrounding the killing." *State v. Hall*, 958 S.W.2d 679, 704 (Tenn.1997). However, circumstantial evidence of a defendant's state of mind will not support a jury verdict of premeditated murder unless the proof of premeditation and deliberation is "so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." *State v. Crawford*, 225 Tenn. 478, 470 S.W.2d 610, 612 (1971). Motive directly impacts the question of premeditation and the defendant's state of mind. *See, e.g., State v. Schafer*, 973 S.W.2d 269, 273 (Tenn. Crim. App. 1997)(holding that the State had failed to prove premeditation because of its failure to prove motive).

The State argued at closing that the defendant's motive was to rape the victim and murder her in an attempt to conceal the rape. In disproving the rape, the DNA evidence introduced on habeas also undermines the State's only proffered motive for the crime and its stated basis for establishing the element of premeditation or malice aforethought necessary to prove first-degree murder. This evidence together with the new evidence of the husband's confessions and Blake's expert testimony appears to raise for House a strong claim of actual innocence of murder in the first degree.

II.

Under current federal death penalty jurisprudence, a defendant's eligibility for the death penalty depends on a combination of federal and state law. One may not be condemned to death under the Eighth Amendment for simple murder. To survive Eighth Amendment scrutiny, there must be a "meaningful basis for distinguishing the few cases in which [death is to be] imposed from the many cases in which it [is] not." *Furman v. Georgia*, 408 U.S. 238, 313 (1972)(White, J., concurring).

This means that where simple murder is committed without any valid "aggravating" or similar class narrowing circumstance, death is cruel and unusual punishment. In order to be generally death eligible under the Eighth Amendment, the jury must find the defendant guilty of a valid "aggravating circumstance" that serves to distinguish those murderers who may deserve the death penalty from

those who do not and thus "circumscribe the class of persons eligible for the death penalty." *See Barclay v. Florida*, 463 U.S. 939, 952-56 (1983); *Zant v. Stephens*, 462 U.S. 862, 877-78 (1983).

Without such a circumstance which renders the crime more culpable, a jury is left without sufficiently clear and definite principles to insure that the death penalty is not arbitrarily and inconsistently applied in violation of the broad standards limiting the death penalty first laid down in *Furman*. The guiding principle that emerged from *Furman* was that States were required to channel the discretion of sentencing juries in order to avoid a system in which the death penalty would be imposed in a "wanto[n]" and "freakis[h]" manner. *Id.*, at 310 (Stewart, J., concurring).

Since *Furman*, the Supreme Court has consistently insisted that there is a fundamental constitutional requirement of channeling and limiting of the sentencer's discretion in imposing the death penalty in order to minimize sufficiently the risk of wholly arbitrary and capricious action. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 189, 206- 207 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *id.*, at 220-222 (White, J., concurring in judgment); *Spaziano v. Florida*, 468 U.S. 447, 462 (1984); *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988).

In its most recent term, the Supreme Court held that "aggravating circumstances," the narrowing mechanism chosen by the State imposing the death penalty, are elements of the crime. *See Ring v. Arizona*, 536 U.S. __, 122 S.Ct. 2428 (2002). As a result, several important constitutional protections attach: "the proscription of any deprivation of liberty without 'due process of law' Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6." *United States v. Apprendi*, 530 U.S. 466, 476-77 (2000). "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id.* at 477 (*quoting United States v. Gaudin*, 515 U.S. 506, 510 (1995)).

The Supreme Court has established that the aggravating elements of the crime that make the accused eligible for the death penalty, like the elements of the underlying crime of murder, depend on state law. *See Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)(holding that to be found actually innocent of the death penalty, a petitioner must show "by clear and convincing evidence that but for constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under applicable state law"). Tennessee law is clear that to be eligible for the death penalty as an initial matter, a jury must unanimously determine that one or more statutory aggravating circumstances have been proven by the State beyond a reasonable doubt. T.C.A. §39-13-204(g) (2002). Here, the jury found three. As explained above, new DNA evidence disproves the first two aggravating factors, and the Supreme Court of Tennessee held that the presentation of the third aggravating factor to the jury constituted prejudicial error.

The first unresolved question of state law is whether a defendant whose sole remaining aggravating factor was introduced in an erroneous manner loses his state defined eligibility for the death penalty based on that sentencing and requires a new sentencing hearing. In other words, in light of the United States Supreme Court's emphasis on the important constitutional protections accorded to a defendant to have aggravating circumstances proven to a jury beyond a reasonable doubt, does Tennessee law require that a defendant be resentenced where the only aggravating factor was presented in an erroneous and prejudicial manner? We also ask the Supreme Court of Tennessee whether, in light of the new DNA evidence and the error in the presentation of the third aggravating factor to the jury, Tennessee law requires that a jury reweigh the aggravating and mitigating circumstances in this case.

On the question of whether the defendant has made a "truly persuasive demonstration of actual innocence" of first degree murder, there arises a third unresolved question of state law. *Schlup*, 513 U.S. at 314, n. 28. As explained *supra*, the new DNA evidence disproves the State's theory that the defendant murdered the victim in the commission of a sexual assault. In light of the Tennessee Supreme Court's extensive jurisprudence on "malice aforethought," we ask whether the DNA

evidence, together with other newly discovered evidence of actual innocence, create a sufficient doubt that House is guilty of first degree murder that Tennessee law would require a new trial on the underlying murder charge.

Thus, we ask these questions, in light of *Schlup v. Delo*, *supra*, in order to ascertain whether there remains a "state avenue open to process [petitioner's] claim" of actual innocence in this case.

ORDER CERTIFYING QUESTIONS TO THE SUPREME COURT OF TENNESSEE

Having now set out in detail the factual and legal basis of House's claim of actual innocence of the aggravating elements and of first degree murder and demonstrated that each are framed by rules of Tennessee state law, we respectfully certify to the Supreme Court of Tennessee under its certification rules,(3) the following two questions respecting the aggravating elements found by the jury and a third question concerning the underlying murder conviction:

(1) When the Tennessee Supreme Court finds error in the presentation of an aggravating factor to a jury, and the remaining aggravating factors are disproven by new DNA evidence, does a defendant lose his current eligibility for the death penalty under state law and require a new sentencing hearing?

(2) If under Tennessee law a jury must weigh the aggravating and mitigating circumstances, and the Supreme Court of Tennessee on review then proceeds to consider the reasonableness of the weighing process, does the Court's review process now permit it to remedy any error in the weighing process by the jury in light of newly discovered evidence?

We also respectfully certify to the Supreme Court of Tennessee one question concerning the "malice aforethought" element of the first degree murder conviction:

(3) Does Tennessee law require a new trial when newly discovered evidence of actual innocence, a significant part of which is in the form of DNA evidence which *could not be discovered* at the time of trial, creates a serious question or doubt that the defendant is guilty of first degree murder?

In accordance with Rule 23 of the Supreme Court of Tennessee, we provide the following required information:

(A) Style of the Case: *House v. Bell*, No. 00-6136

(B) Facts and questions of law: the facts out of which the questions of state law arise, and the questions themselves have been explained *supra*.

(C) The names of the parties: Paul Gregory House and Ricky Bell, Warden

(D) The names, addresses, and telephone numbers of counsel for both parties:

(1) Counsel for Paul House: Stephen M. Kissinger, Assistant Federal Community Defender, Federal Defender Services of Eastern Tennessee, Inc., 530 S. Gay St., Suite 900, Knoxville, TN 37902, 865-637-7979.

(2) Counsel for Ricky Bell: Paul G. Summers, Attorney General & Reporter; Michael E. Moore, Solicitor General; Alice B. Lustre, Assistant Attorney General; Glenn R. Pruden, Senior Counsel, Criminal Justice Division, P.O. Box 20207, Nashville, TN 37202, 615-741-3487.

(E) Designation of one of the parties as the moving party:

The Moving party (Petitioner): Paul House

The Adverse party (Respondent): Ricky Bell, Warden

Accordingly, it is ORDERED that the above questions be certified to the Tennessee Supreme Court and forwarded to the clerk of the Tennessee Supreme Court under Rule 23, Rules of S.Ct. of Tennessee.

III. Response to Dissenting Opinion

Our dissenting colleagues' opinion makes two basic points repeatedly: (1) although the new evidence "might convince some, or even most, reasonable jurors that Paul House is actually innocent" (page 23), some juror might still conclude, even in light of the new evidence, that Paul House should be executed, and (2) the certification of questions to the Tennessee Supreme Court is merely a "novel diversionary process" that will delay House's execution.

With respect to the first point, our dissenting colleagues misunderstand Justice Stevens' opinion for the Court in *Schlup v. Delo*, 513 U.S. 298 (1995). In that case, the Court rejected the old narrow standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), and *Sawyer v. Whitley*, 505 U.S. 333 (1992), in actual innocence cases like this one presenting new evidence. That is why Chief Justice Rehnquist and Justice Scalia dissented. Our dissenting colleagues in this case would apply the old standard of the sufficiency of the evidence at trial to new evidence that indicates that the capital defendant may be legally innocent.

In *Schlup*, it turned out that the Court's reversal saved Schlup's life. He was found to be innocent of the crime. Had the Court followed the standard proposed by our dissenting colleagues, the Eighth Circuit would have been affirmed, there would have been no "delay" to review the new evidence and Schlup would have been executed. For a description of Lloyd Schlup's case and the cases of numerous other condemned prisoners, whose convictions were set aside after numerous levels of trial and appellate review were exhausted, *see* James S. Liebman, et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*, 24-35 & notes 128-132 (Feb. 11, 2002).

The question is not, as our dissenting colleagues seem to believe, whether the trial evidence with the new information remains sufficient for a juror to vote to convict but rather "if they [the new statements] . . . are true," whether "a juror, conscientiously following the judge's instruction requiring proof beyond a reasonable doubt, would vote to convict." 513 U.S. at 331. This is far different from the test used by our dissenting colleagues -- the sufficiency of the evidence in the trial record. The dissent looks to whether there is evidence that could have supported a jury's decision to convict, regardless of the new evidence. But *Schlup* looks instead to the "likely behavior of the trier of fact" – what a conscientious juror *would* do given all the evidence. Justice Stevens specifically holds, in reversing the Eighth Circuit, that "petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict." *Id.*(4)

With respect to the question of "delay," it is better to be safe than sorry, as we learned after Lloyd Schlup's case was reversed. We must remember, as members of the Supreme Court have advised us, that "death is different -- that "[t]he taking of life is irrevocable," so that "[i]t is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights," *Reid v. Covert*, 354 U.S. 1, 45-46 (1957), (Frankfurter, J. concurring), and that "[i]n death cases doubts . . . should be resolved in favor of the accused," *Andres v. United States*, 333 U.S. 740, 752 (1948), and that "[t]he Court . . . has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-99 & n.9 (1983).

We must take seriously the Supreme Court's admonition in *Schlup*, quoted above, that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant habeas relief *if there were no state avenue open to process such a claim*," 513 U.S. 298, 314 n. 28. In such cases as this one, it is not obvious what avenues of relief are open, and we are not inclined to agree with our dissenting colleagues that the door should be closed and the man executed without asking any questions.

One further error in the dissenting opinion should be noted. The dissenters say that all the questions before us are "fully exhausted in the state courts." This is simply wrong. The DNA semen evidence has not been presented to state courts. Neither has the husband's confessions nor the conclusion of the Chief Medical Examiner for the State of Tennessee that the blood found on House's pants leaked from vials of blood from the autopsy of the victim. Had the Tennessee Supreme Court considered this evidence and decided that no avenues of relief are open in the courts of Tennessee, we would not be certifying the case to it.

DISSENT

BOGGS, Circuit Judge, dissenting. In today's opinion, the court does *not* answer the one question that should be before it: "Would some reasonable juror believe that Paul House committed first degree murder and should be subject to the death penalty?" *See Schlup v. Delo*, 513 U.S. 298, 329 (1995). A negative conclusion must be supported by "new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial." *Id.* at 324. Since the court does not decide that question today (though it certainly strongly hints at an answer), I have no affirmative case to rebut. As I will show below, if that question were squarely decided today, one would have to truncate drastically the class of "reasonable jurors" to produce a negative answer.

Instead, the court gives the petitioner what he is seeking, a delay in execution, by a tactic that, if valid and sanctioned by the Supreme Court, would allow any court of appeals to duck its responsibility to decide cases, in favor of returning them to state courts through a process that is without precedent.

The court's opinion attempts to find a precedent for such certification in cases such as *Stewart v. Smith*, 534 U.S. 157 (2001) and *Zant v. Stephens*, 462 U.S. 862, 870 (1983). These cases are not really on point; they involved situations in which the Supreme Court sought to understand more precisely the import of a challenged state law that had been interpreted by federal courts of appeals. In our case, the certified questions ask to have light shed on an issue already before us, whether "there [is] no state avenue open to process such a claim [of actual innocence]." *See Schlup*, 534 U.S. at 314 n.28 (*quoting Herrera v. Collins*, 506 U.S. 390, 417 (1988) (O'Connor, J., concurring)). *Ibid.* Apparently a federal court would not be warranted in granting habeas relief, even making all the other necessary assumptions, if such an avenue were open. However, those cases in no way open the door for a court of appeals, having squarely before it a claim (ineffective assistance of counsel) that is fully exhausted in the state courts, to ask a state court for a rumination on this question.

If the Tennessee Supreme Court answered this question, what would the result be? If it firmly states that there is *no* state avenue open, then we simply return to our current position, many months or years down the road, with our court forced at that point to confront the question that is actually before it now. On the other hand, if it declares that there *is* an avenue open to process such a claim, then I would presume that habeas should be denied on that basis alone, again many months down the road.

This would presumably raise the odd (and unseemly) spectacle of this court denying a habeas petition and the prisoner proceeding toward execution, with only the possibility (which he would have always had anyway) of some last-minute intervention by the state courts. *See Workman v. State*, 41 S.W.3d 100 (Tenn. 2001).

In reality, the court's decision this day seems primarily to be a fishing expedition, undertaken in the hope that the Tennessee Supreme Court will take us off the hook by re-assuming control of the case, under the majority's gentle guidance, or in the hope that we will, at a minimum, inject a significant additional amount of delay. Because I believe that we have squarely presented before us a question that we can answer, I respectfully dissent.

I

Judge Merritt has written an able argument on petitioner's behalf. That argument might convince some, or even most, reasonable jurors that Paul House is actually innocent or should not be convicted. It would not, however, be so compelling that it is more likely than not that no reasonable juror would convict and thus, under established law, it should not avail Mr. House. The court focuses on three new items that would allegedly be so powerful that the *Schlup* standard would be met. I will deal with each briefly.

1. *The semen on the victim's clothing.*

At trial, truthful evidence was presented showing that there were spots of semen on the victim's nightgown and underclothing (though none on or in her body) that were consistent with the physical characteristics of defendant House, though no claim was made that this proved identity. Nor, contrary to the majority's claim, did the State affirmatively contend that he had raped her. At most, as the quotation at page 7 of the majority opinion shows, the state argued that tricking a woman out of bed in the middle of the night and getting her down into a wooden ravine was consistent with "trying to get her to do something that she . . . would [not] want to do with Mr. House. . . ." Defense counsel noted at trial that the semen was equally consistent with the physical characteristics of the victim's husband who was, even then, an alternate suspect under the defense's theory.

2. *Muncey "confessions."*

At the habeas hearing, two women testified that Hubert Muncey confessed to killing his wife. These are statements made many years after the offense, by two women who knew the petitioner, that tend to exculpate him. The women were found not to be credible by the federal district judge. They were available to the defense at the time of trial, but either were not investigated, or were not deemed of sufficient use to call to testify. Finally, contrary to the implication at page 5 of the court's opinion, Artie Lawson did not testify at trial, but only at the habeas hearing. While these witnesses might convince some jurors (unlike the federal district judge), a juror need not be unreasonable to consider these statements to be last-minute fabrications in support of the defendant.

3. *Blood evidence.*

This is a convoluted scientific argument on behalf of an implication of a vast conspiracy on the part of Tennessee law enforcement officials. Simply put, the theory is that House never had any of the victim's blood on his jeans while the jeans were in his possession. Instead, blood from the victim's autopsy was smeared on the jeans in an elaborate charade designed to simulate the blood having been present when the jeans were found. This theory is based on a highly contested interpretation of abbreviations in the original scientific report, and on disputed interpretations of the amount and

location of blood from certain vials after they had been transported. Again, in my view, some reasonable jurors would be likely to believe the direct testimony and evidence in preference to a disputed scenario requiring the perjurious cooperation of numerous government officials.

In addition, some reasonable jurors could (and at least one would) be persuaded by the strong circumstantial evidence presented at trial. Ms. Turner's testimony regarding House's absence during the crucial time surrounding the murder and his return in a disheveled condition is consistent with his committing the murder, and inconsistent with his defense theory. Finally, some reasonable juror, in assessing the strength of the new evidence, would agree with the district judge's finding that House's direct testimony, presented for the first time at the habeas hearing, lacked credibility.

II

The Schlup Standard.

The appropriate standard for this court to employ in judging whether the evidence of House's "actual innocence" is so strong that we should consider his claim of ineffective assistance of counsel, regardless of his procedural default, is set out in *Schlup v. Delo*.(1) While various forms of words are used at different points in the opinion, the clearest statement appears at page 329, where Justice Stevens states that this extraordinary step is permitted only if we judge that "it is more likely than not that *no reasonable juror would* have convicted" the petitioner. *Schlup*, 513 U.S. at 329 (emphasis added) (internal quotation marks omitted). In making this judgment, *Schlup* "allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial." *See Schlup*, 513 U.S. at 327-28, quoted in *Lott v. Coyle*, 261 F.3d 594, 621 (6th Cir. 2001) (Cole and Merritt, JJ.). As Justice Stevens indicates, this is not the same as the standard in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Schlup*, 513 U.S. at 330. This judgment is not limited to the evidence at the original trial, and it focuses on what "would" happen, rather than what constitutionally "could" happen.

Even so, this standard is still one that requires us conscientiously to consider the entire range of "reasonable" jurors. In America, today, there are approximately 200 million persons eligible to serve as jurors. Even with the numbers of statutory and other disqualifications, one would trust that the large majority of these persons are in fact reasonable. For petitioner to fail to meet the *Schlup* standard, we need only assess that one of those potential jurors has a 50+ % likelihood of convicting, considering all the new evidence. As the review of the evidence above shows, that is not a difficult judgment to make. That judgment becomes even easier when the impact of the defendant's own incredible testimony at the habeas hearing is taken into account, as it must be.

However, the difficulty for a defendant seeking to satisfy this standard is even greater, for the standard does not require that *any* individual reasonable juror actually have a 50+ % probability of voting to convict. The standard requires only that we believe it to be more likely than not that *not a single one* of the aggregation of reasonable jurors who might have *some* inclination to vote for conviction would in fact do so. I will explain that difference.

If each person in a group of 100 reasonable jurors had a 10% likelihood of voting to convict the defendant, the outcome of the *Schlup* assessment would depend almost entirely on our belief about the independence of the jurors' judgments. By that, I mean that if each juror's opinion is independent of that of every other juror, it is almost certain that one out of the 100 jurors would convict.(2) If we believed that every juror thought exactly like every other one - that is, that their opinions had no independence at all, then there would be only a 10% chance of conviction by any juror in the whole group, and the *Schlup* standard would be met.

Thus, under these circumstances, the outcome of the *Schlup* assessment could turn on whether we believe there is any independence, or difference, in the thought processes of reasonable jurors. I believe that the experience of virtually every lawyer who has participated in a jury trial is that the

thought processes of jurors have a considerable degree of independence. The reason that one juror may vote to convict (or to acquit) may differ significantly from that of other jurors. When that is the case, we have the following result. If any significant number of reasonable jurors have *some* likelihood of conviction, there is a very high probability that at least one such juror will in fact convict, given almost any reasonable degree of independence.(3) Thus, an honest application of the *Schlup* standard means that a prisoner can meet it only if a judge can conscientiously assert that every reasonable juror is almost certain to vote to acquit. This case does not meet that standard.

In summary, in order to justify overturning a state court judgment, the *Schlup* standard "does not merely require a showing that a reasonable doubt exists in light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Schlup*, 513 U.S. at 329. Footnote 4 of the court's opinion expresses the court's belief that House's sentence must be overturned if "even 50 of 100 . . . jurors would now seriously doubt the persuasiveness of the state's case." This statement is refreshingly candid, because it expresses what a careful reader might perceive to be the standard of many jurists in death penalty cases. However, it is as clear as the English language can make it that this is not the standard stated by Justice Stevens in the quotation above. The footnote clearly supports overturning a sentence in a situation (quite likely the situation in our case), where half of reasonable jurors would not, as the footnote says, "seriously doubt the persuasiveness of the state's case." In such a situation, I find it impossible to believe that a decision-maker, conscientiously reading the words of the *Schlup* decision, could determine that "no reasonable juror would have found the defendant guilty."

As a federal appellate court reviewing a federal habeas court's review of a state court's determination, and attempting to consider (as required by *Schlup*) what "any reasonable juror" (and thus *all* reasonable jurors) would do, we are *inevitably* making hypothetical judgments. That statement is as true of the majority and special dissenting opinions as it is of mine. But we *must* do that in order to be faithful to *Schlup*. Otherwise we are simply doing what some observers may think is done regularly in such cases -- substituting our own judgment of what the evidence shows for the opinion of the jury, and of all jurors.

My mathematical analysis at pages 27-28 is *not* the main line of my analysis. As clearly stated at page 26, a claim such as House's fails *whenever* the reviewing judge can state a belief that some single reasonable juror would in fact still convict, taking into account all the new evidence (see page 26).

The mathematical analysis that so excites the court is simply the portion that goes beyond the statement above to indicate the reality of the meaning of the words that Justice Stevens penned. The standard is indeed a very difficult one to meet; it is not designed simply to allow judges to substitute their own judgment for that of some, or even most, jurors. As *Schlup* states: "It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses." 513 U.S. at 329.

That is all that my analysis attempts to explicate.

The fundamental error of footnote 4 is boldly stated when it complains that the dissent believes "that House should be executed" [more accurately, that his petition should be rejected on a proper application of the law] because "at least 1 hypothetical hold out juror would disagree" with the majority's implied opinion in this case. Any complaint with this statement simply betrays an unwillingness to face up to the exact language in *Schlup*. *That* opinion specifically says that "the standard requires the . . . court to make *a probabilistic determination about what* reasonable, properly instructed jurors would do." *Schlup*, 513 U.S. at 319 (emphasis added). Thus, the Supreme Court specifically requires us to make the type of determination that appears to upset the court. Further, the complaint in footnote 4 simply refuses to confront the fact that if *one juror*, acting reasonably, would have voted to "find him guilty beyond a reasonable doubt" then it is definitionally impossible to make the necessary determination, in the words of Justice Stevens, that "*no* juror, acting reasonably,

would have voted to find him guilty beyond a reasonable doubt." *Ibid.* (emphasis added). The fact that the court may consider such an argument to be "hypothetical," "medieval scholastic" or "remarkable" does not alter the words and holding in the Supreme Court's opinion.

III

A careful reader will discern that a number of the significant criticisms of the dissent that are leveled in section III of the court's opinion do not correspond with what is actually written in the dissent. At page 19, the court's opinion states that I am applying "the old standard of the sufficiency of the evidence at trial." In fact, at pages 24-25, I consider the question in light of all the evidence, old and new, as I clearly state at page 26. Further a careful reader will find that I make no reference to the "any reasonable juror could convict" standard of *Jackson v. Virginia*, but rather rely solely on the holdings in *Schlup*.

The charges made at page 20 that "the test used by our dissenting colleagues [is] the sufficiency of the evidence in the trial record" and "whether there is evidence that could have supported a jury's decision to convict, regardless of the new evidence" are nowhere held, supported, nor implied in the dissent.

A careful reading of *Schlup* also belies the statement at page 20 that "the question is . . . 'if they [the new statements] . . . are true' whether a juror . . . . would vote to convict.'" (quoting *Schlup*, 513 U.S. at 331). That language is excerpted from the portion of *Schlup* that specifically makes that statement in the context of facts that "the Court of Appeals assumed [were true] for the purpose of applying its understanding of the *Sawyer* standard." *Ibid.* In other words, Justice Stevens was saying that *if* the reviewing court believed the new evidence to be true (while the Justice recognized that "those new statements may, of course, be unreliable") *then* the *Schlup* standard would be met. He certainly did not say that a reviewing court was required to find reliable any and all new evidence proferred.

Finally, it should be noted that this dissent does not state, contrary to page 21, that "all the questions before us" are fully exhausted. As is clearly stated at page 23, it is the underlying claim before us, "ineffective assistance of counsel," that is fully exhausted.

IV

The Aggravating Factors.

The court's opinion also tries to use the allegedly new evidence to undermine the three aggravating factors found by the jury.

With regard to the first aggravating factor, our court's statement (page 11) that the primary evidence for the existence of "torture or serious physical abuse" was the evidence of rape is belied both by the state's failure specifically to argue that point, and by the extensive evidence of the physical beating and strangulation of the victim.

The second aggravating factor is that House committed the crime in the course of an attempted rape or kidnaping. Kidnaping includes "unlawfully . . . inveigling [or] enticing away another with the intent of causing him to be secretly confined or imprisoned against his will." Surely some reasonable juror would find that, if House committed the offense as described in the testimony, he enticed the victim away in order to confine her against her will. Not every reasonable juror would be likely to believe that he tricked her out of the house in order to discuss epistemology, and a sudden affray over Foucault caused him to kill her in a blind rage.

The third aggravating factor is the simplest: that House had previously been convicted of a felony

"involving the use or threat of violence to a person." This item was amply proved by Utah state records showing House's conviction for aggravated sexual assault. The only error was that evidence was also introduced (truthfully) that he had been sentenced to five years to life for that offense, and was on parole. All that the Tennessee Supreme Court found was that the latter factual information was irrelevant. It certainly did not find that there was any prejudice by the introduction of such evidence. Since House was at liberty when the crime was committed, he must have either served out his sentence, escaped, or been on parole. Of the three, being on parole is the most benign interpretation of the evidence. Nor was the length of the sentence for this crime particularly prejudicial. Thus, the third aggravating factor has not been undermined to any significant degree.

V

I turn now to the specific questions that the court's opinion certifies to the Tennessee Supreme Court. It is frequently said, in response to a rhetorical question, that there are "smuggled assumptions" within a question - the unstated premises upon which the question rests. In this case, however, the assumptions have not been smuggled - they have been cleared through customs with all duties paid.

The first question specifically states that "a defendant whose sole *remaining* aggravating factor was introduced in an erroneous manner" is involved. (Emphasis added.) Of course, the destruction of the other factors is the very element that should be decided, not assumed. Indeed, as discussed above, the remaining aggravating factors are at most weakened, but not removed, even if the defendant's evidence is believed. Of course, if his evidence is believed, he didn't commit the crime at all, so the aggravating factors should not even be considered. If, on the other hand, he did commit the crime, then the strength of the evidence that purports to undermine the aggravating factors is itself demolished or greatly weakened.

The second question appears to be a demand that the Tennessee Supreme Court re-entertain a petition for post-conviction relief. It asks "in light of the new DNA evidence" (which has never been presented to the Tennessee courts), and in light of "the error in the presentation of the third aggravating factor" (a matter fully considered by the Tennessee Supreme Court), what is the state of Tennessee law? This is essentially asking the Tennessee court to render an advisory opinion based on a record that its processes and fact finders have not considered.

The third question continues boldly to assert that the "evidence disproves the state's theory that the defendant murdered the victim in the commission of a sexual assault." It purports to ask the Tennessee Supreme Court to consider "malice aforethought," but to do so "together with other newly discovered evidence of actual innocence." Again, the theories are in contradiction. If House did not commit any crime, then malice aforethought is irrelevant. If he did commit the crime, albeit without depositing semen on the victim's clothing, then it is extremely difficult to say that luring a person out of her bed and home in the middle of the night and murdering her in a way that results in her body being found "partially concealed in a brush pile at the bottom of a wooded embankment" 100 yards from her home (page 3, lines 3-5 of section I) does not permit some reasonable juror to find that there was malice aforethought. In particular, the statement from the court's opinion quoted above presents the facts much more fairly than the court's bland statement at page 11 that "[a]lthough House purportedly lured the victim out of her house, her body was found within yards of her doorstep. . . ."

The majority's basic problem is that if the evidence introduced at the habeas hearing does not compel a belief in House's innocence of the crime of killing Ms. Muncey, then it does almost nothing to undermine the death sentence. Thus, the questions purporting to deal with the sentence independent of the crime seem to have no basis.

Finally, the first and third questions as stated at pages 17 and 18 do not even purport to address the supposedly crucial question of whether a state avenue is open to process a claim. Instead, they ask, in terms that assume that all of the relevant material is procedurally properly before some Tennessee

court, does "the law" (1) "require a new sentencing hearing" and (3) "require a new trial?"

Question 2 does at least appear to address some possibly relevant question by asking whether the Tennessee Supreme Court's "review process now permit[s] it to remedy any error in the weighing process by the jury in light of newly discovered evidence?" However, beyond our invitation to the Supreme Court to "remedy any error . . . by the jury," the most the Tennessee Supreme Court could do would be to say that there are avenues for last-minute post-conviction petitions. This possibility has already been amply demonstrated in *Workman v. State*, 41 S.W.3d 100 (Tenn. 2001). There, a "petition for a writ of error coram nobis" was filed in state court two days before a scheduled execution, based on alleged new evidence purportedly showing actual innocence. *Id.* at 104. The Tennessee Supreme Court swept aside all procedural obstacles and directed consideration on the merits. *Id.* at 103. Thus, there is clearly no basis for a remand to see if the Tennessee Supreme Court can do what it has already done in an analogous case.

VI

In short, the court's opinion today is a procedural muddle, leading to far greater future muddles, to little practical effect other than to add an additional layer of delay.

Contrary to the statements in the court's opinion, the question raised by this dissent is not whether this decision "will delay House's execution." (page 19) The question is whether it will unjustifiably delay reaching finality. I have no particular brief for this defendant's execution, or his exoneration, other than as the evidence in this case leads me to make a decision based on existing law. I do have a brief for the value of reaching finality of decision, a brief that has been eloquently explained by the Supreme Court in *McCleskey v. Zant*, 499 U.S. 467, 491-92 (1991). If the court is fully convinced that no avenues are available (contrary to *Workman v. State*), and if it is convinced, contrary to the above demonstration, that the *Schlup* standard can be met on this evidence, then it should simply say so. The mere invocation of the statement "better to be safe than sorry" (page 21) simply means that no decision should ever be made.

It is obvious that the court's opinion is undergirded by an evaluation of the evidence that would argue that very few, if any, reasonable jurors would find House guilty beyond a reasonable doubt. If the court would clearly hold that now, at least we would have a straightforward legal decision, albeit one subject to challenge on further review. But in this case, we have undertaken a novel diversionary process, and added a new and unjustified procedure for avoiding finality. This decision could be invoked by any court whenever a claim of actual innocence, however tenuous, is raised for the first time in federal court. I therefore respectfully dissent.

DISSENT

RONALD LEE GILMAN, Circuit Judge, dissenting. Because I am not comfortable with either the majority opinion or Judge Boggs's dissent, I write separately to express my own views. Although I agree with the majority opinion that the petitioner presents a strong claim for habeas relief, at least at the sentencing phase of the case, I disagree with the decision to certify questions to the Tennessee Supreme Court. Judge Boggs lays out a cogent argument to the effect that the majority's questions are loaded with a number of unwarranted assumptions, the answers to which will not advance the ultimate resolution of this case. I therefore agree with Judge Boggs that this court can and should decide the case on the merits as it is currently before us.

Although I agree with Judge Boggs's rationale on the question of certification, I decline to join his conclusion that we should affirm the district court's opinion. I find particularly disturbing the notion

that the defendant's entitlement to relief hinges on a hypothetical statistical analysis that attempts to find mathematical precision in an endeavor that in the end requires a judgment call based on a sound understanding of human nature. I agree with Judge Merritt's response on this point as expressed in footnote 4 of his opinion. Judge Boggs's conclusion that "an honest application of the *Schlup* standard means that a prisoner can meet it only if a judge can conscientiously assert that every reasonable juror is almost certain to vote to acquit" seems to me an overstatement of Justice Steven's language that the test is whether "it is more likely than not that no reasonable juror would have convicted." Judge Boggs's interpretation would make the *Schlup* standard virtually impossible for a defendant to meet. In my opinion, it is a misreading of the standard as articulated by the Supreme Court.

In sum, I believe that there is no need to certify any questions to the Tennessee Supreme Court and this court should decide the issues currently before it on the merits. But I also disagree with Judge Boggs's interpretation of the *Schlup* standard and his resulting resolution of this case. Finding myself caught between Scylla and Charybdis (to say nothing of medieval angels and Foucault), I respectfully file this separate dissent.

Footnotes

[1] Laura Muncey's name is spelled both with and without a "u" throughout the record. For the sake of consistency we are using the "Laura" spelling. She is also referred to by her married name, Laura Muncey Tharp.

[2] House's mother also testified that he did not use her automobile that evening.

[3] We certify this case pursuant to Rule 23, Rules of the S.Ct. of Tennessee.

[4] Judge Boggs has added a lengthy argument based on his statistical and mathematical juror analysis designed to prove scientifically his belief that "it is almost certain that one out of the 100 jurors would [still] convict" House, even in light of the new evidence (see paragraph 21 and footnotes 2 and 3 of the dissenting opinion). Judge Boggs then seems to assert that House should be executed and there should be no certification of questions apparently because of his belief that at least 1 hypothetical hold out juror would disagree with the other 99 on House's case. This is a remarkable judicial argument that Judge Boggs somehow derives from Justice Stevens' opinion in *Schlup v. Delo*.

In no way, however, does Justice Stevens' holding in *Schlup* suggest that courts should engage in this kind of reasoning -- akin to medieval scholastic argumentation about how many hypothetical angels, or hypothetical minds, can sit on the head of a pin and disagree. Justice Stevens' opinion does not require unanimity among some hypothetical number of hypothetical juridical minds. It is an opinion designed to deal with real situations presenting new evidence of actual innocence in death cases. Scholastic arguments aside, surely no one would really hold the view that House should be executed if 99 of 100, or even 50 of 100, jurors would now seriously doubt the persuasiveness of the state's case. In the real world of nonhypothetical juridical minds, only a new trial with real jurors will resolve such a problem.

[1] This assumes, of course, that we have already determined that there is no state avenue open to consider that claim further. This is, of course, contrary to fact as shown by *Workman v. State*, 41 S.W.2d 100 (Tenn. 2001). *See infra* at 34.

[2] The mathematics is such that the chance that no one of 100 independent jurors, each with a 10% probability of voting to convict, would convict, is .9 to the 100th power, which is less than 1 chance in 25,000.

[3] The mathematics is a bit complicated, but here is an example. If a group of 100 reasonable jurors each has a 10% likelihood of conviction, we can assess the degree of independence of each pair of jurors as follows:

1) If their opinions are wholly dependent, they will, of course, agree 100% of the time;

2) If their opinions are wholly independent, they would still agree 82% of the time. In our example, 81% of the time they would both acquit, 1% of the time they would both convict, and 18% of the time one would convict and one would acquit.

If their views are even a little bit independent, for example, if they now agree only 98% rather than 100% of the time, mathematics indicates that there is a very high likelihood, well beyond 50%, that at least one of the reasonable jurors would in fact vote to convict.

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Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2002 FED App. 0084P (6th Cir.)

File Name: 02a0084p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Paul Gregory House, *Petitioner-Appellant,* *v.* Ricky Bell, Warden, *Respondent-Appellee*	No. 00-6136

Appeal from the United States District Court

for the Eastern District of Tennessee at Knoxville.

No. 96-00883--James H. Jarvis, District Judge.

Argued: October 31, 2001

Decided and Filed: March 11, 2002

Before: MERRITT, NORRIS, and SILER, Circuit Judges.

COUNSEL

ARGUED: Stephen M. Kissinger, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Glenn R. Pruden, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellee. **ON BRIEF:** Stephen M. Kissinger, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Glenn R. Pruden, Alice B. Lustre, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville,

Tennessee, Michael E. Moore, Paul G. Summers, TENNESSEE ATTORNEY GENERAL'S OFFICE, CIVIL LITIGATION & STATE SERVICES DIVISION, Nashville, Tennessee, for Appellee.

NORRIS, J., delivered the opinion of the court, in which SILER, J., joined. MERRITT, J. (pp. 28-33), delivered a separate dissenting opinion.

OPINION

ALAN E. NORRIS, Circuit Judge. Petitioner Paul House appeals from the district court's denial of a writ of habeas corpus, 28 U.S.C. § 2254. A Tennessee jury found petitioner guilty of the murder of a neighbor, Carolyn Muncey, and sentenced him to death.

This court granted a certificate of appealability as to all issues. However, petitioner has limited his brief to a discussion of the following: 1) Whether the manner in which the Tennessee courts applied the doctrine of waiver during petitioner's post-conviction proceedings constitutes an adequate and independent state procedural bar to his ineffective assistance of counsel claim; 2) Whether petitioner established his actual innocence.

For the reasons that follow, we affirm the denial of the writ.

I.

This court reviews a district court's legal conclusions in a habeas proceeding de novo and its factual findings for clear error. *See Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir. 1999). Petitioner initiated this habeas action on September 30, 1996; the petition was amended on September 16, 1997. Consequently, this court's review of the state court's decision is governed by the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997).

Because factual determinations by state courts are entitled to a presumption of correctness, 28 U.S.C. § 2254(e)(1), we will begin by quoting from the Tennessee Supreme Court's opinion denying petitioner relief in his direct appeal:

> The victim of the homicide was Mrs. Carolyn Muncey, who lived with her husband and two young children on Ridgecrest Road in rural Union County, Tennessee. Mrs. Muncey was in her late twenties, and her children were about eight and ten years old at the time of her death on July 13, 1985.
>
> In March 1985 appellant Paul Gregory House was released from prison in Utah and moved to the rural community in which the Muncey family lived. There he resided with his mother and step-father for several weeks, but in June he moved into a trailer occupied by his girl friend, Donna Turner, which was located about two miles from the Muncey home. Appellant did not own an automobile; but he was permitted to drive his mother's car from time to time, and he also drove Ms. Turner's car on some occasions.

Other than doing occasional farm work for his stepfather, appellant does not appear to have been regularly employed. He did not testify at trial at either the guilt phase or the sentencing hearing. He was shown to have had one prior conviction for aggravated sexual assault, a charge to which he pled guilty on March 16, 1981 in Salt Lake County, Utah. Apparently he was placed on parole in that state, and supervision of his parole was transferred to Tennessee when he returned to this state. He was approximately twenty-three years old at the time of the homicide in this case.

Mrs. Muncey disappeared from her home in the late evening of Saturday, July 13, 1985. Her badly beaten body was found on the following afternoon at about 3 p.m., lying partially concealed in a brush pile about 100 yards from her home.

Apparently the husband of the victim was not at home during the early part of the evening of July 13. Mrs. Muncey and her children visited a neighbor and left at about 9:30 p.m. to return to their home. Later the older child, Laura, awoke. She testified that she heard a voice which sounded like her grandfather making inquiry about her father. She also heard someone tell her mother that her father had been in a wreck near the creek. She heard her mother sobbing or crying as she left the house. When her mother did not return, the two children went to look for her at neighboring homes. Not finding her, they returned home and waited until their father arrived. Discovering that his wife was missing, he took the children back to the home of the neighbor where they had visited earlier in the evening and then called for members of his family to look for his wife.

When the body of Mrs. Muncey was discovered the next afternoon, she was dressed in her nightgown, housecoat and underclothing. Her body was badly bruised, and there were abrasions and blood giving every evidence that she had been in a fierce struggle. Apparently a severe blow to her left forehead had caused her death. It appeared, however, that she had also been partially strangled. A pathologist testified that the blow to her left forehead caused a concussion and hemorrhage to the right side of the brain from which she died, probably one to two hours after being struck. He testified that she probably would have been unconscious after having been struck. He estimated the time of her death at between 9 p.m. to 11 p.m. on Saturday, July 13, but emphasized that this was at best a rough estimate.

Appellant never confessed to any part in the homicide, and the testimony linking him to it was circumstantial. There was evidence showing that he knew Mr. and Mrs. Muncey and had been with them socially on a few occasions. Through defense proof there was testimony that Mrs. Muncey and her husband had been having marital difficulties and that she had been contemplating leaving him. There was no evidence to indicate that the appellant was aware of that situation, however, or that there had been any previous romantic or sexual relationship between him and the victim.

On the afternoon of Sunday, July 14, 1985, two witnesses saw the appellant emerge from a creek bank at the side of Ridgecrest Road at the site where Mrs. Muncey's body was later found concealed in the underbrush. He was wiping his hands with a dark cloth and was walking toward a white Plymouth automobile, parked on the opposite side of the road, belonging to his girl friend Donna Turner. The two witnesses spoke briefly to

appellant, all of them discussing the fact that Mrs. Muncey had disappeared. Later the two witnesses became suspicious of what they had observed and returned to the point where they had seen appellant emerge from the embankment. Looking down the bank, they found the partially concealed body of Mrs. Muncey. They promptly notified the sheriff.

Appellant later admitted that he had been in the area but denied that he had seen the body of Mrs. Muncey or had any knowledge of its presence. The dark rag which he had been using when first seen was never produced. It was the theory of the State, however, that this was a dark "tank top" or jersey which appellant was shown to have been wearing on the previous evening, July 13.

Appellant gave two statements to investigating officers in which he denied being involved in the homicide. In both of these statements he stated that he had been at Ms. Turner's trailer the entire evening of July 13 and that he had not left until the next afternoon when he went to look for Hubert Muncey after learning of the disappearance of the latter's wife.

On Sunday afternoon various witnesses observed that appellant had numerous scratches and bruises on his arms, hands and body, there being an especially significant bruise on the knuckle of his right ring finger. Appellant explained that these injuries had been sustained innocently earlier during the week, but when Ms. Turner was called as a witness, she said that she had not observed them prior to the evening of July 13. Appellant also told investigators that he was wearing the same clothes on Sunday, July 14 as he had been wearing the previous evening. It was later discovered, however, that a pair of blue jeans which he had been wearing on the night of the murder was concealed in the bottom of the clothes hamper at Ms. Turner's trailer. These trousers were bloodstained, and scientific evidence revealed that the stains were human blood having characteristics consistent with the blood of Mrs. Muncey and inconsistent with appellant's own blood. Scientific tests also showed that fibers from these trousers were consistent with fibers found on the clothing of the victim. There were also found on her nightgown and underclothing some spots of semen stain from a male secretor of the same general type as appellant.

Some of the most damaging evidence against appellant was given by his girl friend, Ms. Turner. She at first told investigators that he had not left the trailer during the course of the evening of July 13. Later, however, she modified this testimony to state that he had been in the trailer until about 10:45 p.m. at which time he left to take a walk. She stated that he did not take her automobile. When he returned an hour or so later, he was panting, hot and exhausted. He was no longer wearing either his blue jersey or his tennis shoes. The shoes were later found in an area different from the place where appellant told her he had lost them.

Appellant told Ms. Turner that he had thrown away the navy blue tank top because it had been torn when he was assaulted by some persons who tried to kill him. It was after the appellant's return to the trailer that Ms. Turner first noticed the bruises and abrasions on his hands referred to previously.

Appellant's mother testified that he had not used her automobile on Saturday evening.

She testified that during Saturday and Sunday she had been planning to separate from appellant's stepfather and that appellant had been assisting her in her preparations for moving.

At the sentencing hearing the State proved appellant's prior conviction for aggravated sexual assault. Appellant's parents testified that he came from a broken home and had been subjected to stress as a result of that experience. Appellant's mother also testified that in the interval between the guilt trial and the sentencing hearing appellant had attempted suicide. She read into evidence a letter which he had written to her denying his involvement in the homicide. Apparently he had cut his wrists while in the jail awaiting the sentencing hearing, but the degree and extent of the injuries were not detailed in evidence. They do not appear to have been serious and did not prevent his attending the sentencing hearing.

Although the evidence against appellant was circumstantial, it was quite strong. Particularly incriminating was the testimony that he had emerged from an embankment where the body was found, wiping his hands on a dark cloth, without disclosing to anyone the presence of the body. Damaging also were the discovery of his bloodstained trousers and the testimony of Ms. Turner, which a trier of fact could have found sufficient to demolish his alibi and to demonstrate that he had been in a heavy struggle near the time when the homicide must have occurred.(1) A classic case for determination by a jury was presented, and the evidence clearly is sufficient to support the conviction.

Following the sentencing hearing, the jury imposed the death penalty. In their verdict they found that the State had established three aggravating circumstances, these being: (1) appellant had previously been convicted of a felony involving the use or threat of violence to the person; (2) the homicide was especially heinous, atrocious, or cruel; and (3) it was committed while appellant was committing or attempting to commit or fleeing from the commission of rape or kidnapping. T.C.A. §§ 39-2-203(i)(2), (5), and (7).

There was ample evidence to support all of these findings and to support the conclusion of the jury that no mitigating circumstances had been established which would outweigh the aggravating circumstances. Certainly the sentence of death was not disproportionate to that imposed in other cases in view of the violent and brutal nature of the homicide shown in this record.

State v. House, 743 S.W.2d 141, 142-43 (Tenn. 1987) (footnote original).

After petitioner's conviction and sentence was handed down in February 1986, he took a direct appeal to the Tennessee Supreme Court. The Tennessee Supreme Court affirmed in the opinion just cited. Petitioner failed to seek a writ of certiorari in a timely manner.

Post-conviction proceedings began in February 1988 with the filing of a *pro se* petition for post-conviction relief in the trial court. This petition, amended after appointment of counsel, was denied by the trial court on November 29, 1988. Although claims of ineffective assistance of trial counsel were submitted to the court, they were not argued, nor was trial counsel called as a witness at the hearing. Only a single issue was taken to the Tennessee Court of Criminal Appeals: whether a jury instruction improperly misled jurors into believing that they must unanimously find mitigating circumstances. The Court of Criminal Appeals affirmed the conviction on December 15, 1989. The

Tennessee Supreme Court denied leave to appeal and the United States Supreme Court denied certiorari.

A second petition for post-conviction relief was filed on December 14, 1990. After conducting hearings, the trial court denied relief on the ground urged by the State: that all the issues presented had either been previously determined in the first petition or, if not, had been waived.

The Court of Criminal Appeals affirmed the trial court on September 2, 1992. However, the Tennessee Supreme Court remanded for reconsideration in light of a recent opinion that the Court later withdrew. The Court of Criminal Appeals remanded the matter to the trial court for further consideration of the waiver issue. This remand was averted, however, when the Tennessee Supreme Court re-instated the trial court's initial dismissal of the second petition for post-conviction relief. *House v. State*, 911 S.W.2d 705, 722 (Tenn. 1995). Critical for this habeas action is the Court's holding concerning waiver:

> We conclude that a "full and fair hearing" sufficient to support a finding of previous determination occurs if a petitioner is given the opportunity to present proof and argument on the petition for post-conviction relief. We further conclude that the rebuttable presumption of waiver is not overcome by an allegation that the petitioner did not personally and therefore, "knowingly and understandingly," waive a ground for relief. Instead, waiver is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney. Finally, we conclude that there is no right to effective assistance of counsel in post-conviction proceedings, and therefore, an allegation of ineffective assistance of prior post-conviction counsel does not preclude application of the defenses of waiver and previous determination.

Id. at 714. Because of its holding, the Court re-instated the trial court's original denial of relief.

Petitioner filed a *pro se* habeas petition on September 30, 1996, which was eventually amended after the district court granted *in forma pauperis* status and appointed counsel. The district court granted the State's motion for summary judgment on the majority of claims in an order entered June 25, 1998. It conducted an evidentiary hearing on petitioner's actual innocence claim in February 1999. After considering post-hearing briefs of counsel, the district court denied habeas relief. It also denied a certificate of appealability, which was later superseded by this court's grant of a certificate as to all issues.

II.

The first issue raised by petitioner on appeal involves his contention that both the Tennessee courts and the district court erred when they concluded that his ineffective assistance of counsel claims were procedurally barred.

Initially, the district court deferred granting summary judgment to the State on the claims of ineffective assistance of counsel because "these claims are intertwined with petitioner's claim of actual innocence." Memorandum Opinion, June 25, 1998 at 41. It went on to provide the following rationale:

> [T]he court will be unable to determine whether the claims should be barred on the ground of procedural default until the conclusion of the evidentiary hearing. *Bousley v.*

> *United States*, 118 S. Ct. 1604, 1611 (1998) ("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" Accordingly, in addition to petitioner's claim of actual innocence, the court will consider [the ineffective assistance of counsel claims].

Id. at 41-42. However, after conducting an evidentiary hearing and determining that petitioner had failed to establish actual innocence, the district court held that petitioner's ineffective assistance of counsel claims were "barred on the ground of procedural default." Memorandum Opinion, February 16, 2000 at 46-47.

Petitioner concedes that an adequate and independent state-law ground can procedurally bar subsequent habeas claims. This circuit has developed a four-part analysis to determine whether a claim is barred:

> Under *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986), this circuit utilizes the following four-part analysis when the state argues that a federal habeas claim has been procedurally defaulted in state court: (1) whether there is a procedural rule that is applicable to the petitioner's claim and whether the petitioner failed to follow this rule; (2) whether the state courts actually enforced the state procedural rule; (3) whether the state procedural rule is an adequate and independent state ground to foreclose federal relief; and if so (4) whether the petitioner has established cause for his failure to follow the rule and prejudice by the alleged constitutional error.

White v. Schotten, 201 F.3d 743, 749 (6th Cir. 2001).

Petitioner points to the tortured path that his case took in the courts of Tennessee and argues that no hard and fast rule existed to procedurally bar his *pro se* ineffective assistance of counsel claims. Specifically, he points to the following paragraph of the opinion of the Tennessee Supreme Court:

> *Our research has revealed no reported Tennessee case dealing directly with the issue of the appropriate standard to apply when determining whether an issue has been waived.* Courts in other states have split on whether to apply a subjective or objective standard and provide us little assistance because their decisions were based largely on the particular state statutory procedure. However, Tennessee cases dealing generally with the concept of waiver in the post-conviction context apply an objective standard and impute the conduct of counsel to their clients. *See e.g., Caruthers v. State*, 814 S.W.2d 64, 70 (Tenn. Crim. App. 1991); *State v. Bishop*, 731 S.W.2d 552 (Tenn. Crim. App. 1986).

House, 911 S.W.2d at 713 (emphasis added) (footnotes omitted). In petitioner's view, this opinion illustrates that no rule had been clearly established.

We do not write on a clean slate with respect to this issue. *See Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001); *see also Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998). In *Cone*, this court made clear that the *House* opinion relied upon by petitioner merely explained existing state law. Petitioner in that case contended that he had not personally waived a challenge to a jury instruction. In rejecting his claim, we explained:

> First, we are aware of two cases in which courts have considered whether a petitioner

> is bound by his attorney's waiver of a constitutional claim. *Coe*, 161 F.3d 320, and *House* v. *State*, 911 S.W.2d 705 (Tenn.1995). The *House* court stated that "[w]aiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney." *House*, 911 S.W.2d at 714. *House* does not appear to announce a new standard, as Cone suggests. Rather, it seems merely to affirm Tennessee's standard of waiver.
>
> In *Coe*, as we explained earlier, this court held that the petitioner had procedurally defaulted his state claim that the trial court failed to give a correct malice instruction. He presented the claim for the first time in his second petition for post-conviction relief rather than his first petition, as a consequence of which the Tennessee Court of Criminal Appeals found it had been procedurally waived. *Coe*, 161 F.3d at 329-31. This court cited *House* when determining that Coe had defaulted his claim under an "objective" standard of waiver. However, the petition upon which the court relied in finding the default was filed before *House* was decided. Thus, concerning defaults that occurred before *House* was decided, the Tennessee courts have strictly and regularly applied the traditional standard of waiver, whether the waiver is made by counsel or the petitioner personally.
>
> . . . .
>
> Last, we are not persuaded that Cone is correct in his claim that Tennessee law was in a state of confusion on whether an "objective" or "subjective" standard of waiver is appropriate. It is not clear from the Tennessee cases that procedural default may not be charged to a petitioner who has not himself "knowingly and understandingly" waived timely assertion of a federal constitutional claim when his attorney has done so. We are satisfied that Tennessee follows the traditional rule that a petitioner is chargeable with his attorney's failure to timely assert a claim and with the consequences of failing to do so.

Id. at 974. We find this reasoning dispositive of the issue before us and accordingly conclude that the district court was correct when it determined that petitioner's ineffective assistance of counsel claims had been procedurally defaulted.

III.

We turn next to petitioner's claim of actual innocence. In *Schlup v. Delo*, 513 U.S. 298 (1995), the Court held that a petitioner must show either cause and prejudice or a miscarriage of justice in order to obtain habeas review of an otherwise procedurally defaulted claim. With respect to a miscarriage of justice, the petitioner must demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup*, 531 U.S. at 832. This exception is rare and should be applied only in the extraordinary case:

> Claims of actual innocence pose less of a threat to scarce judicial resources and to principles of finality and comity than do claims that focus solely on the erroneous imposition of the death penalty. Though challenges to the propriety of imposing a sentence of death are routinely asserted in capital cases, experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. See *supra*, at 864. To be credible, such a claim requires petitioner to

> support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful. Even under the pre-*Sawyer* regime, "in virtually every case, the allegation of actual innocence has been summarily rejected." The threat to judicial resources, finality, and comity posed by claims of actual innocence is thus significantly less than that posed by claims relating only to sentencing.
>
> Of greater importance, the individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent.

513 U.S. at 324-25 (footnotes omitted). Thus, "[t]o establish the requisite probability [that petitioner is actually innocent], the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." 513 U.S. at 327.

Because the district court conducted an evidentiary hearing on the issue, there is testimony about events beyond what was presented during the original trial. Petitioner contends that this new evidence is sufficient to establish his actual innocence. We will summarize it before explaining why, in our view, petitioner has failed to show that it is more likely than not that no reasonable juror would have convicted him.

Petitioner testified for the first time at the evidentiary hearing. He offered this version of the night of the murder: "I went for a walk. I got jumped, ran around, came back." He went on to explain that the terrain was hilly and it was dark:

> I had only been walking about maybe 20 minutes at the most it seems like. A truck pulled up behind me with, I remember it as being like 4-wheel drive. It sat up high, you know. Headlights were on. It had lights across the roof of the cab and they were on. I couldn't see anything other than that about the truck. . . . I turned around and I kept walking. I believe there were at least two guys in the truck. I know the driver got out on his side, one guy got out on the passenger side. I couldn't really discern it, but I think there was one other guy in the cab. The driver came up. I can remember he said something, but I don't even know if I heard him correctly at the time. He grabbed me by the arm. He started to jerk me around. I turned around turned and threw back with my left-hand. I hit him. He let go. I started running. I ran kind of diagonally across the road into some trees, bushes, whatever it was. I heard a shot, at least one. There might have been two. I am not sure. I ran around through those woods for a while. I don't know how long. When I came back out - I believe at one point I ran to the right, once I got into the woods, and started heading back. . . . I went back across the road up to Donna's house. When I got, I stepped on something, a sharp rock or something. I knew I stepped on it. When I looked down I only had one shoe. I lost one of them while I was running. I took the other one off and threw it across the road.
>
> . . . .
>
> I didn't even notice my shirt was gone until I got up to the trailer . . .

As the factual summary of the Tennessee Supreme Court attests, this version of events does not differ markedly from the one presented by Donna Turner during trial. When asked why he initially lied to investigators by telling them that he had not left the trailer at all, petitioner responded, "I was on parole. I didn't want to draw attention to myself."

In short, petitioner's testimony merely restates a scenario presented to the jury that convicted him. Moreover, the district court, which had the opportunity to assess petitioner's demeanor, found his testimony to be less than credible.

During the evidentiary hearing, petitioner devoted considerable time to the trial testimony of Billy Ray Hensley, the individual who saw petitioner near the spot where the body was discovered. Specifically, petitioner introduced maps and photographs in order to show that Hensley could not have seen what he purported to see.

At trial, Hensley testified that his wife received a call at about 2 p.m. on July 14 that Mrs. Muncey was missing. He drove to the Muncey trailer and talked to some of the family members. He then "went to check on my tobacco." After visiting his fields, he ended up on Bear Hollow Road, which is near where the Muncey's live.

He then had an encounter with petitioner, which he described in these terms:

> [J]ust before I rounded the curve on Ridgecrest, whatever the name of that road is, I saw Mr. House come out from under a bank, wiping his hands on a black rag. And I went on down to Little Hube's(2) driveway. I pulled up in the driveway where I could see up toward Little Hube's house and I seen Little Hube's car wasn't there, and I backed out in the road, and come back towards to the Dump Road, that is what I call it. And that is when Mr. House flagged me down . . . .

The two men had a short conversation about the fact that Mrs. Muncey was missing. Petitioner was driving his girlfriend's white Plymouth.

After leaving, Hensley became suspicious and, along with his friend Jackie Adkins, returned to the spot where he thought petitioner had emerged: "I said - right along here is where I saw the boy [petitioner], and I got out and was looking off the bank, and he [Adkins] got out and walked around the car and he said - oh, my God."

On cross-examination, Hensley conceded that he could not have seen petitioner actually "down in the embankment." He would have first seen him at the top of the bank. Defense counsel also tried to bring out some inconsistencies in Hensley's statements concerning precisely when and where he first saw petitioner. On re-direct, the prosecution attempted to have Hensley clarify:

> Q. Let me ask you if this is a true statement - "I travelled about 500 feet on Ridgecrest Road when I saw a '66 or '67 white Plymouth sitting on the left-hand side of Ridgecrest Road," is that true?
>
> A: That's true.
>
> Q. Is that where you saw the car?

A: Yes, sir.

Q: Is this true? "I saw a man later identified to me as Paul G. House enter the roadway from the right-hand side of the road"?

A: He was walking toward the road, yes.

Q: All right. "And he was coming up over the bank and he had a black rag in his hand and he was wiping his hands," is that true?

A: That's true.

. . . .

Q: The estimation [of the distance on the road] that you have given, that you were pressed for, is that an accurate measurement or is that an estimate on your part?

A: That is just an estimate.

The exhibits introduced by petitioner during the evidentiary hearing were designed to show that Hensley could not have seen petitioner coming up the embankment. However, even if we accept petitioner's contention that Hensley could not have seen him until he emerged onto the road, it is undisputed that petitioner was seen in the general vicinity of the body carrying a black rag. Moreover, trial counsel effectively cross-examined Hensley regarding his inconsistent statements about when and where he saw petitioner. Thus, in our view, petitioner's attack on Henley's testimony advances his cause little, if at all.

In addition to presenting his own version of events while attempting to cast doubt on the accuracy of Hensley's testimony, petitioner takes aim at the physical evidence that linked him to the crime.

Dr. Alex Carabia performed the autopsy. He testified at trial that death was caused by a blow to the left side of her head. The victim died about an hour and a half after she was hit.

At trial, photographs of the bruises on petitioner's body were entered into evidence and three witnesses testified about his physical condition. Prior to his arrest, petitioner provided various accounts of their origin: the mysterious fight on the night of the murder; tearing down a shed a few days earlier. During closing argument, the prosecution emphasized these inconsistent statements.

At trial, FBI Agent Paul Bigbee testified that the blood samples taken from the victim were degraded. Nonetheless, the blood found on the jeans was consistent with that of the victim and not with that of petitioner.

At the evidentiary hearing, petitioner mounted a concerted challenge to this evidence.

Four vials of blood were taken from the victim during the autopsy. These were placed in a styrofoam container, which was sent from the Tennessee Bureau of Investigation (TBI) to the FBI. The petitioner referred to two demonstrative exhibits in the district court: photographs of the styrofoam container viewed from above and from the side. It was sealed by the TBI in both directions

for shipping. The photograph of the side view shows that one of the seals was broken and then resealed by a second layer of tape. FBI Agent Bigbee placed his lab number on the second layer. The first layer of tape is incomplete; it only covers the lid of the container. Agent Bigbee conceded that it was possible that the first seal had been cut before the second seal had been placed over it. To support the theory that the container was opened between the time it left the TBI and arrived at the FBI, petitioner points to the fact that the label on the container indicated that it held both blood and vaginal secretions. Yet, Agent Bigbee received the secretions in a manilla envelope.

As mentioned above, four vials of blood were sent to the FBI. According to Agent Bigbee, he would have used one fourth of a vial in testing. Petitioner's trial serology expert, Howard Bragdon, took a photograph when he received the styrofoam container from the FBI. In petitioner's view, the photograph shows one of the tubes was only one-half full and another nearly empty. Furthermore, Agent Bigbee's testimony to the contrary, it appears that some blood had spilled.

In the district court, Dr. Cleland Blake, Assistant Chief Medical Examiner for the State, examined the results of the FBI tests of the blood found on the blue jeans and also the blood taken from Mrs. Muncey. He theorized, based upon the degree of enzymatic degradation, that the blood on the blue jeans came from known samples, such as the blood contained in the vials, and not from Mrs. Muncey's body. When confronted with this conclusion, Agent Bigbee was doubtful, noting that much depended upon handling and individual circumstances.

An expert on blood splatter analysis, Paulette Sutton, also testified at the evidentiary hearing. She noted that some of the blood stains on the jeans were mixed with mud. Yet the photographs of the crime scene showed no mud present. Furthermore, National Weather Service records show that it had not rained for three days prior to the murder. Finally, there was no mud on the victim's nightgown.

Finally, petitioner notes that no blood was found on the tennis shoes he was wearing on the night of the murder. Charles Burks, petitioner's trial attorney, also testified at the evidentiary hearing. The district court summarized his testimony on the issue of the tennis shoes as follows:

> During the evidentiary hearing, Mr. Burks reviewed a report from the Forensic Services Department of the TBI, which referred to Mr. House's tennis shoes and indicated the absence of blood on the tennis shoes. Mr. Burks did not recall having seen that report before. That would have been relevant to Mr. Burks because, although there was blood on Mr. House's jeans near the cuff, there was no blood on the shoes he was wearing at the time of the offense. The shoes were found in the general area of Ms. Turner's trailer long after the murder.

Memorandum Opinion, February 16, 2000 at 25.

The court recounted the discovery of the blue jeans in these terms:

> TBI Agent Charles Scott testified that he became involved in the investigation of Mrs. Muncey's murder, at the request of another agent, on the second day of the investigation. He took a statement from Mr. House and obtained a consent to search from Ms. Turner. He went to Ms. Turner's home and seized a pair of blue jeans from the clothes hamper in the bathroom. The jeans had "reddish brown" stains that he suspected was [sic] blood on the upper part of the jeans and near the cuff; there was also some light colored mud that was not completely dry.

> Mr. Scott did not thoroughly examine the jeans at that time but rather folded them and put them in a paper bag. Mr. Scott did not recall ever seeing the jeans in a plastic bag.

Memorandum Opinion, February 16, 2000 at 23.

The court then summarized the testimony of petitioner's expert witnesses. Larry Johnson testified as an expert in crime scene investigation and opined that "the packaging of materials in the case did not meet professional standards" because items were not wrapped separately. DNA expert Lisa Calandro eliminated petitioner as the donor of the semen found on Mrs. Muncey's underwear and nightgown.

Howard Bragdon, manager of laboratory operations for DCI Laboratory in Nashville testified for petitioner as well. This laboratory had performed the blood analysis for petitioner at trial. Bragdon noted that he took possession of the blue jeans, the victim's clothes and fingernail scrapings, as well as blood from both the victim and petitioner, on October 29, 1985. The next day, after transporting them to Nashville, he took pictures that showed dried blood around the upper left corner of the box in which the items had been contained. According to the district court, "Mr. Bragdon admitted that it was his custom to inspect the condition of serological evidence when he took possession and that there was no notation on the receipt of spillage. Mr. Bragdon also admitted that he had no way of knowing the condition of the blood samples at the time of the FBI's serological testing." Memorandum Opinion, February 16, 2000 at 35.

The court characterized Dr. Blake's testimony as follows:

> Dr. Blake testified that there was no total chain of custody. Also, according to Dr. Blake, Dr. Carabia [the coroner] failed to refrigerate and preserve the blood in the tubes, failed to seal the tubes of blood, which could result in spillage, and failed to package the items individually.
>
> Dr. Blake's testimony was based upon his review of photographs of the physical evidence, and was relevant to Dr. Blake's opinion that the blood on petitioner's blue jeans resulted from spillage of Mrs. Muncey's blood in the laboratory tubes. . .
>
> . . . .
>
> Dr. Blake testified that if fresh blood had spilled on the blue jeans while Mrs. Muncey was alive, and then dried, the enzymes on the jeans would not have deteriorated to the same extent as the enzymes in the blood taken from Mrs. Muncey. From this, Dr. Blake concluded the blood was not spilled on the jeans while Mrs. Muncey was alive but rather came from the spillage of the test tubes.
>
> Dr. Blake also testified with respect to the age of Mr. House's bruises, based upon photographs taken from the state court record. Dr. Blake estimated some bruises at one to two days old; others at five to six days old. Also, in Dr. Blake's opinion, the bruising on Mr. House's right ring finger was an injury from being mashed; it was not consistent with striking someone.

Memorandum Opinion, February 16, 2000 at 37-38.

The district court also recapped the testimony of the blood spatter expert Ms. Sutton, who concluded that "the blood stains could not have resulted from spillage because the blood and mud would have had to have spilled at the same time." Memorandum Opinion, February 16, 2000 at 42.

With respect to the blood, the court determined,

> Without question, one or more tubes of Mrs. Muncey's blood spilled at some time. It is likely the spillage occurred prior to the receipt of the evidence by [the] laboratory hired by Mr. House's trial attorney. Based upon the evidence introduced during the evidentiary hearing, however, the court concludes that the spillage occurred after the FBI crime laboratory received and tested the evidence.
>
> . . . [T]he enzyme deterioration, as well as Mr. Muncey's alleged confession and the blood spillage, does not negate the fact that Agent Scott saw what appeared to be bloodstains on Mr. House's blue jeans when the jeans were removed from the laundry hamper at Ms. Turner's trailer and that the blood was in fact from Mrs. Muncey.

Memorandum Opinion, February 16, 2000 at 45-46.

Petitioner not only presented evidence to the district court that undermined the case against him, he also offered an alternative theory of the crime: that Mr. Muncey killed his wife.

At the evidentiary hearing, petitioner produced witnesses who testified about Mr. Muncey's alcoholism and also his physical abuse of his wife. One acquaintance, Kathy Parker testified, "[Mrs. Muncey] was constantly with black eyes and busted mouth." A friend, Hazel Miller, testified that Mr. Muncey told her that was going to get rid of his wife a few months before her death. In the district court, Mr. Muncey acknowledged that he "smacked" his wife at least once.

As for the day of the murder, Mr. Muncey was supposed to help dig a grave. He went over to his father's place, helped to work on some cars, then dug the grave. However, rather than go home, he went to the weekly dance at the C & C Recreation Center where he testified that he stayed until about midnight. He then arrived home to find his wife missing.

Kathy Parker told the district court that Mr. Muncey visited her on a Friday night in 1985 after the murder. Friends were sitting around drinking when Mr. Muncey "started crying and going on and rambling off." According to Parker, he was "[t]alking about what happened to his wife and how it happened and he didn't mean to do it, but I don't know exactly what all was said." She went on, "[H]e said they had been into an argument and he slapped her and she fell and hit her head and it killed her and he didn't mean for it to happen." He was drunk when he made this confession. After hearing it, Parker claimed, "I freaked out and ran him off." The next day her mother took her to the courthouse to tell someone about it. However, "I never did really get to talk to anybody." When the district court asked her about the motivation behind her testimony, she replied, "An innocent man is in jail."

On cross-examination, Parker testified that she had tried to come forward but no one seemed interested. She had had seven or eight beers on the night of the confession.

Parker's sister, Penny Letner, also heard the confession from Little Hube. Once again, she recalled that he was "pretty well blistered." According to Letner,

> He said he didn't mean to do it. That she was "bitching him out" because he didn't take her fishing that night. that he went to the dance instead. He said when he come home that she was still on him pretty heavily "bitching him out" again and that he smacked her and that she fell and hit her head. He said he didn't mean to do it, but I had to get rid of her, because I didn't want to be charged with murder.

Letner had not been drinking. She was frightened by the talk and left the party. As a young mother of 19, she was too scared to report the confession.

Based upon the statements of Letner and Parker, petitioner posits the following scenario:

> When Mr. Muncey got home, he and his wife resumed their fight. He hit her at least once and she fell. When he checked, he found that he had killed her. He took her body down by a creek running near their home and hid it with some brush and branches.
>
> Whether Mr. Muncey ever went back to the dance is uncertain. Constable Wallace, who was providing security at the dance, testified that he never saw Mr. Muncey return after he left around 10:30 p.m. Mr. Muncey claimed during the hearing that he never left the dance until it broke up some two or more hours later.

Petitioner's brief at 33-34. Petitioner also points out that Dennis Wallace(3) did not think that Mr. Muncey seemed upset when he reported his wife's disappearance or when the body was recovered. Also, Mr. Muncey asked a neighbor, Artie Lawson, the next morning to tell people that he was at the dance. Since she had not attended it herself, she declined. Her daughter, Mary Atkins, however, testified that she not only saw Little Hube at the dance, but that she saw him hit his wife.

The district court discounted the testimony of Letner and Parker: "The court is not impressed with the allegations of individuals who wait over ten years to come forward with their evidence." Memorandum Opinion, February 16, 2000 at 45. Instead, the court credited the testimony of Lora Muncey Tharp, the daughter who testified at both the trial and evidentiary hearing:

> While in bed, she heard a deep voice saying her dad had been involved in a wreck next to the creek. Sometime later she and her brother got up and went looking for their mother. They went to the neighbors and looked up and down the driveway. She did not see anything out of the ordinary in the house; nothing was out of place and there was no sign of a struggle.
>
> According to Ms. Tharp, her parents got along fine. They argued, but she did not recall any physical pushing or hitting. If they argued, she could hear them if she was in her bedroom. The family did not have air conditioning in the home. She did not hear any arguments that night.
>
> The court found Ms. Tharp a very credible witness. She had no reason to lie. Her testimony during the evidentiary hearing was consistent with her trial testimony.

Memorandum Opinion, February 16, 2000 at 12-13.

As the preceding recitation makes clear, petitioner has mounted a concerted attack on his

conviction. To prevail, however, he must do more than raise questions about the reliability of portions of trial testimony or the manner in which physical evidence was handled or analyzed; he must show "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327. Moreover, in weighing the new evidence, we review the factual findings of the district court for clear error. *Campbell v. Coyle*, 260 F.3d 531, 539 (6th Cir. 2001).

The following facts that implicate petitioner are undisputed: he lied to investigators about his whereabouts on the night of the murder; he gave inconsistent versions of the origins of the scratches and bruises on his hands and arms; he was seen near where the body was discovered on the day after the murder; he lied about what he was wearing on the night of the murder; blood and mud splattered blue jeans belonging to petitioner were found at the bottom of Ms. Turner's laundry hamper; petitioner has a deep voice and Lara Muncey testified that the man who came to the trailer on the night of the murder had a deep voice; and, according to Dr. Sutton, the blood and mud found on petitioner's blue jeans had been mixed together, which "certainly eliminates the possibility of any stains being created by contamination in an evidence container."

With respect to petitioner's theory that Mr. Muncey committed the murder, we defer to the finding of the district court that Ms. Letner and Ms. Parker, who allegedly heard Mr. Muncey's confession, were not credible. Furthermore, the content of Ms. Letner's testimony - that Mr. Muncey killed his wife during an argument in their trailer - is belied by the presence of the children in the trailer, who heard no such confrontation, and the lack of any signs of a struggle.

Petitioner has succeeded in showing that the semen attributed to him during the trial was that of Mr. Muncey and that, at some point, the blood evidence appears to have been mishandled. However, the district court concluded that "the spillage occurred after the FBI crime laboratory received and tested the evidence," a factual conclusion that is not clearly erroneous.

Despite his best efforts, the case against petitioner remains overwhelming. We therefore conclude that he has fallen short of showing, as he must, that it is more likely than not that no reasonable juror would have convicted him in light of new evidence.

IV.

The judgment of the district court is **affirmed**.

DISSENT

MERRITT, Circuit Judge, dissenting. I dissent from the majority opinion affirming the [illegible]al of Petitioner Paul House's petition for habeas corpus under 28 U.S.C. § 2254. As with many [illegible]r Tennessee death penalty cases, this case had several errors in the trial phase which necessitate a new trial. I have a serious question about whether House is guilty of the crime for which he was convicted.

1. *The New Semen Evidence Disproves Rape as the Motive.*

First, the new evidence pertaining to the semen found on the victim's underwear and nightgown undermines the State's proffered motive of rape at trial and thus raises a serious question as to whether a jury would have found Mr. House guilty, and would have used the inference of rape as an aggravating factor in sentencing him to death. At the district court habeas hearing, House offered undisputed testimony from DNA expert Lisa Calandro that eliminated House as a potential donor of the semen. Ms. Calandro concluded that the victim's husband was the donor of the semen. In addition, there is no other physical evidence supporting rape or attempted rape of the victim. There was no evidence of penetration, the victim's clothing was not ripped or removed, and there were no bruises on the victim indicating an attempted rape. The State seems now to concede these facts.

Yet, at trial, the State argued in its closing rebuttal that the Petitioner's motive in his purported killing of the victim was rape, based on the inference that the semen on the victim's clothing was his. The State presented the following argument:

> Now you may have an idea why he did it. The evidence at the scene which seemed to suggest that he was subjecting the lady to some kind of indignity, why would you get a lady out of her house, late at night, in her night clothes, under the trick that her husband has had a wreck down by the creek? Why is it that you want to get her down by the creek? . . . . [I]t is either to keep her from telling what you have done to her, or it is that you are trying to get her to do something that she nor any mother on that road would want to do with Mr. House. . . . and you kill her because of her resistance.

Tr. Trans. Vol. IX, p. 1302-03. Because the only motive presented by the State at trial was based on evidence now completely discredited, I would issue the writ requiring a new trial. This new evidence obviously also mandates a new sentencing hearing because rape was the underlying basis for one of the three aggravating factors presented at trial. Coupled with the prior conviction for sexual assault, the State's assertion that the jury infer rape added a level of egregiousness to the crime that would not otherwise have been present and as a result was particularly prejudicial to the jury's determination of aggravating and mitigating circumstances at the sentencing phase.

Both the majority here and the lower court assert that because the aggravating circumstance at issue is rape and/or kidnapping, disproving the rape is not enough to create reversible error. It is clear, however, based on the information before the jury, that rape, not kidnapping, was the action resulting in the finding of an aggravating circumstance. Because the new evidence contradicts the jury's inference that House raped the victim, I find that this error is one that might reasonably be thought to have had "substantial and injurious effect or influence" on both the jury verdict and death sentence. *Kotteakos v. United States*, 328 U.S. 750, 776 (1946).

2. *The Husband's Confession Tends to Disprove the Crime.*

Second, I am troubled by the cursory treatment of two independent accounts of the confession of Hubert Muncey that he -- the husband -- committed the crime. Both Kathy Parker and Penny Letner provided consistent accounts of Muncey's admission of guilt. There was no evidence in the record that challenged the reliability of these statements or suggested any bias or motive for either to be untruthful. Also, the confessions are supported by the well documented domestic abuse of the victim by Muncey and his actions the following morning when he asked a neighbor, Artie Lawson, to lie for him and provide an alibi by testifying that he was at the dance for the entire evening.

The district court, however, discounted the confessions because both witnesses had waited over ten years to come forward. In addition, the district court found that the testimony of Lara Muncey Tharp contradicted the testimony of Letner and Parker because Tharp did not hear any struggle and none of the furniture was out of place in the house. This interpretation is erroneous because neither Letner or Parker asserted that Muncey's purported fight with his wife occurred *inside the house*. They both testified that he went home from the dance and got into the fight with his wife, but did not describe *where* the fight occurred. Muncey could have asked his wife to come outside of the house in order to not disturb their children. Tharp's testimony that her father was not abusive toward her mother, despite the common knowledge in the community that he physically abused her, further supports the idea that Muncey might ask his wife to leave the house in order to express his displeasure with her.

In addition, while Tharp may appear as a credible witness now that she is in her twenties, Tharp was only ten years old at the time of the incident, raising a question as to how accurate or specific her memory may be. For instance, at the initial trial, Tharp described a car arriving at the house prior to her hearing the low voice that told her mother that her father had been in a wreck. At the district court hearing, however, Tharp denied hearing a car that night. It should be for a state trial jury to weigh the credibility of a daughter of a potential suspect with both emotional and personal incentive to protect her father. It is not for us or the District Court to decide this question or indulge in a presumption that she has an infallible memory of events that happened in the middle of the night when she was ten years old. As a result of the underlying facts, I find that the district court committed clear error by discounting the credibility of *two* independent, unbiased individuals without any rationale other than the time between the confession and the testimony before the district court. The state trial court should weigh this evidence at a new time.

3. *The Blood Evidence Creates a Serious Doubt.*

Third, analysis of the blood on House's jeans raises serious doubts as to whether the blood came directly from the victim or spilled on the jeans from vials of blood of the victim sent with the jeans to the lab. Agent Bigbee tested the blood from Ms. Muncey's body and the blood found on Paul House's jeans. There was a clear match, revealing that the blood on his jeans belonged to the victim. A closer examination of the forensic evidence, however, suggests that the blood on the jeans may have come from the forensic sample taken from Ms. Muncey's body, not from her body as she was murdered.

The most significant piece of forensic evidence suggesting this conclusion is the consistency in enzyme degradation between the sample from Ms. Muncey's body and the five samples from the jeans. Enzymes are proteins which have a complex molecular structure. Their fragile structure is only maintained by the proper environment provided in the human body. Over time, enzymes degrade; that is, they lose their structure and shape and become inactive. The blood tests performed by Agent Bigbee on the victim's blood and the five samples from the defendant's jeans looked for the presence of various enzymes (to see whether they had denatured or not) in the blood. Of the ten enzymes tested, six had conclusive results. All six enzymes matched. Thus, it is reasonable to infer that the enzymes in the blood on the jeans degraded at the same rate as the blood in the sample taken from the victim's body. Because they degraded at the same rate despite being in two different media, it appears that the enzymes came from the same sample, that is, the blood on the defendant's jeans came from the sample taken from the victim, not the victim herself.

In his report, Dr. Cleland Blake, Assistant Chief Medical Examiner for the State, reached the

conclusion that the blood on House's jeans came from the samples taken from the victim's body, presumably based on theory of enzmatic degradation explained above. He did not, however, explain how he reached his conclusions in his report. Recognizing the significance of Blake's conclusion to the question of House's innocence, the district court inquired about the enzymatic degradation of the blood stains, but did not receive a satisfactory explanation from Dr. Blake. Because Dr. Blake neglected to explain in layman's terms the method by which he reached his conclusion, the district court relied on the testimony of Agent Bigbee who opined that Blake's theory was incorrect. I believe that on the surface, Blake's findings are compelling and require further exploration. Because of the paramount significance of these findings to the question of House's innocence, an independent analysis by a blood expert of Blake's theory of enzymatic degradation is needed to determine whether the blood on House's jeans came from the victim herself or from a forensic blood sample. In addition, I would, to the extent possible, have the untested fingernail scrapings of the victim examined to determine whether there is any DNA evidence.

Standing alone, one might argue that the similarity in enzymatic activity was merely coincidental. However, there is additional evidence suggesting that the sample in the vials of blood may have been tampered with. As Dr. Blake noted, there was no unbroken chain of custody. Larry Johnson, an expert in crime scene investigation, similarly stated that "the packaging of the materials in the case did not meet professional standards."

Furthermore, there is blood missing from the sample taken - one of the four vials is empty and another is only half-full - but Agent Bigbee used only one-fourth of a vial in performing his tests. The photograph of the styrofoam container clearly shows that blood spilled in the container. The tape on the container was mysteriously cut and retaped contrary to standard procedure. The label on the container said it contained the semen and the blood evidence, but the semen evidence was shipped separately. Also, the location of the blood on the jeans is odd. The five spots were found on the outside left leg, on the inside left thigh, on the *inside* right pocket, outside the right pocket, and on the right cuff, respectively.

The testimony of Pauline Sutton also raises questions as to whether the jeans were tampered with. She noted that some of the blood stains were mixed with mud. The National Weather Service records show that it had not rained for three days prior to the murder, and photographs of the crime scene showed no mud present. Lastly, there was no mud on the victim's nightgown. All of this evidence raises serious questions as to how the mud got on the jeans. The district court relies on TBI Agent Charles Scott's testimony that the jeans had "reddish brown" stains when he took them from the clothes hamper. Mr. Scott, however, admittedly did not thoroughly examine the jeans. Because he could have tampered with the jeans, and because the forensic evidence does not support his testimony, a new trial is warranted in light of all the problems in this death case.

In sum, I believe the new evidence of the semen, the confessions, and the enzymatic degradation make it more likely than not that a reasonable doubt would be raised in the mind of any reasonable juror. Accordingly, I would grant the writ of habeas corpus.

Footnotes

[1] After returning from his "walk," appellant suggested marriage to Ms. Turner for the first time in their relationship. It was at least arguable that he thought by this means her testimony could be rendered inadmissible by the husband-wife privilege.

[2] "Little Hube" is the nickname of the victim's husband, Hubert Muncey.

[3] Dennis Wallace was the Chief of Police of Luttrell, the nearest town.

FILED

Feb 16 7 49 AM '00

U.S. DIST. COURT
EASTERN DIST. TENN.

BY DEP. CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

PAUL G. HOUSE,

Petitioner,

v. 3:96-cv-883

RICKY BELL, Warden,

Respondent.

ORDER

In accordance with the accompanying Memorandum Opinion, the petition for the writ of habeas corpus is **DENIED**. The stay of execution previously entered in this matter is **VACATED**. A certificate of appealability **SHALL NOT ISSUE**.

ENTER:

James H. Jarvis
UNITED STATES DISTRICT JUDGE

ENTERED AS A JUDGMENT

Deputy Clerk

2/16/00
176 73 [286]

FILED

Feb 16 7 49 AM '00

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EASTERN DIST. TENN.
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PAUL G. HOUSE,

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Respondent.

MEMORANDUM OPINION

This is a petition for the writ of habeas corpus under 28 U.S.C. §2254; the petitioner is presently incarcerated on death row. For the following reasons, the petition will be **DENIED**.

I. Procedural Background

The state provided the court with copies of petitioner's state court proceedings. [Court File No. 4, Addenda 1-8; Court File No. 6, Addenda 9-39]. Petitioner Paul Gregory House was convicted of the first degree murder of Mrs. Carolyn Muncey and was

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sentenced to death by electrocution. His conviction and sentence were affirmed on direct appeal, *State v. House*, 743 S.W.2d 141 (Tenn. 1987), and he was twice denied post-conviction relief. *House v. State*, C.C.A. No. 28 (Tenn. Crim. App. December 15, 1989) (UNPUBLISHED DECISION, TEXT IN WESTLAW, 1989 WL 152742) [Addendum 12], *permission to appeal denied, id.* (Tenn. March 5, 1990) [Addendum 15], *cert. denied*, 498 U.S. 912 (1990) [Addendum 18]; *House v. State*, 911 S.W.2d 705 (Tenn. 1995) [Addendum 34], *cert. denied*, 116 S.Ct. 1685 (1996) [Addendum 39].

In his petition for federal habeas corpus relief, Mr. House raised fifty-six grounds for relief. The court granted the respondent's motion for summary judgment on the majority of the claims, finding that the claims were either correctly decided by the state court on the merits or procedurally defaulted. The court reserved ruling, pending an evidentiary hearing, on Mr. House's claims of actual innocence of the offense, actual innocence of the death penalty, and ineffective assistance of counsel based upon counsel's failure to adequately investigate Mr. House's guilt or innocence, failure to call all available witnesses that would have benefitted the defense, failure to adequately investigate mitigating circumstances, and failure to call appropriate witnesses or put on appropriate evidence during the penalty phase.

An evidentiary hearing was held on February 1, 1999, through February 3, 1999, and a transcript of the daily testimony was prepared. [Court File Nos. 274-276, respectively]. Written closing arguments were filed by the parties. [Court File Nos. 279-282]. The matter was taken under advisement. The following represent the court's findings of fact and conclusions of law. Fed. R. Civ. P. 52(a).

II. Findings of Fact

Carolyn Muncey lived with her husband, William Hubert ("Little Hube") Muncey, Jr., and two young children in Union County, Tennessee. Mr. Muncey was not home during the early evening of Saturday, July 13, 1985. Mrs. Muncey and her children visited a neighbor and returned home around 9:30 p.m. Her daughter testified she awoke later and heard a deep voice, that sounded like her papaw's, tell her mother that her father had been in a wreck. Her mother left the house crying. When Mrs. Muncey failed to return, the children went looking for her at their neighbors. Failing to find her, they came home and waited until their father arrived. *House*, 743 S.W.2d at 142.

Mrs. Muncey's badly beaten body was found the following Sunday afternoon around 3:00 p.m. Death was caused by a severe blow to her left forehead. Bruis. of her body, abrasions and blood indicated Mrs. Muncey had struggled fiercely. *Id.*

Mr. House was questioned by law enforcement officials and subsequently charged with the murder. The evidence against him was purely circumstantial. His girlfriend, Donna Turner, testified that, at approximately 10:45 p.m. on Saturday, July 13, Mr. House left the trailer they shared to take a walk. He returned about an hour later, panting, hot and exhausted, without his shirt or tennis shoes. She noticed numerous bruises and abrasions on his arms, hands and body, including the knuckle of his right ring finger. Mr. House told Ms. Turner he had been assaulted by some men, that he had lost his shoes, and had thrown his shirt away because it had gotten torn. *Id.* at 143-44.

Two witnesses testified that, on the following Sunday afternoon, they saw Mr. House emerge from a ditch along the road; he was wiping his hands with a dark cloth. They discussed the disappearance of Mrs. Muncey with him. Becoming suspicious, the two later returned to the spot and, looking down the bank, saw Mrs. Muncey's body partially concealed in the underbrush. *Id.* at 143.

Mr. House gave two statements to investigators; in both he denied any involvement in the murder and denied having left Ms. Turner's trailer Saturday evening. He also said he was wearing the same clothes on Sunday that he had been wearing on Saturday evening. However, investigators later discovered a pair of blood-stained blue jeans in the bottom of Ms. Turner's clothes hamper. The blood had characteristics consistent with the Mrs.

Muncey's blood and inconsistent with petitioner's blood. Also, fibers from the jeans were consistent with fibers found on Mrs. Muncey's clothes. In addition, semen stains, from a male secretor of the same type as Mr. House, were found on Mrs. Muncey's nightgown and underclothing. *Id.*

At sentencing, the State proved Mr. House's previous conviction for aggravated sexual assault. The jury imposed the death penalty, finding that the State had established three statutory aggravating circumstances: Mr. House had a prior felony conviction involving the use or threat of violence; the homicide was especially heinous, atrocious, or cruel; and the homicide was committed while Mr. House was committing or attempting to commit or fleeing from the commission of rape or kidnapping. *Id.* at 144.

Mr. House's claim of actual innocence is premised on his allegation that Mrs. Muncey was actually killed by her husband after an argument. He also alleges that Mrs. Muncey's blood got on his blue jeans during the transportation of the evidence to the crime laboratory of the Federal Bureau of Investigation (FBI) for testing. Mr. House's theory is that one or more of the vials of blood taken from Mrs. Muncey leaked during transit. Mr. House also posits the theory that the blood was spilled, either accidentally or intentionally, while the evidence was in the possession of law enforcement personnel before the transfer to the FBI.

At the evidentiary hearing, Mary Atkins, a native of Union County, testified that she went to a dance at the C&C Rec Hall in the Luttrell area of Union County on the Saturday night before Mrs. Muncey's body was found; she was not sure of the exact date. She saw "Little Hube" and his wife arguing in the parking lot, and saw "Little Hube" grab his wife and backhand her. She could not hear what they were arguing about. Mrs. Muncey then left the parking area on foot. Ms. Adkins learned the following Monday that Mrs. Muncey was dead.

According to Ms. Atkins, the parking area was well-lit. Even though Ms. Adkins admitted she went to the dance at the rec hall every Saturday night, she denied she could be mistaken about which Saturday night she saw the Munceys arguing in the parking lot.

Ms. Adkins testified that, prior to the week-end in question, she had seen bruises on Mrs. Muncey's face. According to Ms. Adkins, she grew up with "Little Hube," had not seen him for the last two years, and did not have any hard feelings or animosity toward him. She stated that no one had threatened her or coerced her into testifying.

Ms. Atkins' mother, Artie Lawson, a life-long resident of Union County, testified that, on Sunday morning of the week-end in question, "Little Hube" came to her house. He asked her to say, if anyone came to talk to her, that he was there for breakfast at her

house at six o'clock, which was not true. Even though Ms. Lawson was not at the dance, "Little Hube" also asked her to say she saw him at the dance that Saturday night. Ms. Lawson found out that Sunday evening that Mrs. Muncey was dead.

Ms. Lawson testified that "Little Hube" was and still is a good friend, that she had not seen him in a long time, that she had not had any disagreements with him, and that she saw him a lot before his wife died but not a lot after Mrs. Muncey died.

In response to the respondent's motion for summary judgment, petitioner filed the affidavit of Artie F. Lawson, which differed somewhat from her testimony during the hearing. Ms. Lawson testified by affidavit that, in the early morning hours of Sunday, July 14, 1985, William Hubert Muncey, Jr., came to her residence, told her that his wife was dead, and that he had found Mrs. Muncey's body. [Court File No. 194, Exhibit C]. However, in response to questioning by the court during the evidentiary hearing, Ms. Lawson testified that Mr. Muncey told her that Sunday morning that "his wife was gone" and that someone else told her that Mrs. Muncey was dead. Ms. Lawson also stated she did not know who found Mrs. Muncey's body. [Court File No. 274, p. 25].

Penny Letner, who grew up around Mr. Muncey, testified that, sometime after Mrs. Muncey's death, she was at a get together at the home of her sister, Kathy Parker, when "Little Hube" came to the residence. Ms. Letner was unsure of the date of the get together; Mr. House was incarcerated at the time and it was either just before or during the trial.

According to Ms. Letner, "Little Hube" was "pretty well blistered" and "was sitting there and he went to crying and was talking about his wife and her death and he was saying that he didn't mean to do it." [*Id.* at 28]. Ms. Letner testified that "Little Hube" said his wife was "'bitching him out'" because he went to the dance instead of taking her fishing and, when he came home from the dance, Mrs. Muncey "was still on him pretty heavily 'bitching him out' again and that he smacked her and that she fell and hit her head." [*Id.*]. Mr. Muncey told Ms. Letner he had to get rid of his wife because he "didn't want to be charged with murder." [*Id.*].

Ms. Letner left the house immediately after Mr. Muncey's statements because she was scared; she was nineteen years old and had a small child. She denied that she was drinking that night. She also denied having any problems or disagreements with "Little Hube."

Ms. Lemer did not report Mr. Muncey's statements to the police because she was scared and did not think the police would listen to anything she had to say. According to Ms. Lemer, she came forward at this time because an investigator for Mr. House's case started asking her questions and it was not right for a man to be in jail for something he did not do.

When asked what made it not right 13 years later, but okay for the intervening 13 years, Ms. Lemer answered: "There wouldn't nobody listen to me. Finally there was someone willing to talk to me." [*Id.* at 32]. However, when asked "Who did you try to talk to?", she answered, "Didn't try to talk to nobody. I didn't think they would listen to me." [*Id.*].

Ms. Lemer's sister, Kathy Parker, testified that the get together was on a Friday night during warm weather, although she was not sure of the date. She, some family members, and some friends were sitting around drinking when "Little Hube" walked in and sat down. After ten or fifteen minutes, he started crying and rambling off, "[t]alking about what happened to his wife and how it happened and he didn't mean to do it". [*Id.* at 37]. According to Ms. Parker, Mr. Muncey said "they had been into and [sic] argument and he slapped her and she fell and hit her head and it killed her and he didn't mean for

it to happen." [*Id.* at 38]. Ms. Parker testified that Mr. Muncey was very intoxicated and very emotional at the time.

After his statement, Ms. Parker "freaked out and run him off." [*Id.*]. The next day she went to the Union County Sheriff's Department and tried to speak to the Sheriff. He was busy and sent her to a deputy, who sent her to someone else; she never did talk to anybody about it. According to Ms. Parker, she came forward now because an innocent man is in jail. She denied knowing Mr. House and also denied having any disagreement with Mr. Muncey.

Ms. Parker did not attempt to contact Mr. House's attorney during the trial and she did not contact the newspaper with her claim that an innocent man had been convicted.

Hazel Miller, a lady who had known Mr. Muncey all his life, testified that, several months prior to Mrs. Muncey's death, "Little Hube" came to her house and during their conversation said that "[h]e was upset with his wife, that they had had an argument and he said he was going to get rid of that woman one way or the other." [*Id.* at 48]. Ms. Miller denied any disagreement or falling out with Mr. Muncey, and denied she had been coerced into testifying.

Dennis Wallace testified he was the Chief of Police of Luttrell at the time of Mrs. Muncey's murder. That Saturday evening he was working the dance at the C&C recreation center. He saw "Little Hube" at the dance and saw him leave between 9:30 and 10:30 p.m. He did not recall seeing "Little Hube" return to the dance.

Later, around 1:40 a.m. Sunday morning, Mr. Wallace was dispatched by the Sheriff's Department to the Muncey home on a missing person's call. When he got to the home he found Mr. Muncey, who was intoxicated. Mr. Muncey told Mr. Wallace that his wife had been kidnapped. Mr. Muncey told Mr. Wallace when he got home, he fixed a sandwich, went to the bedroom, and found his wife was not in bed.

Mr. Wallace looked around the inside of the house while there and did not notice anything out of place, no furniture knocked over, and did not see any blood. Mr. Wallace and Mr. Muncey searched the weeds around the house looking for Mrs. Muncey. Mr. Wallace notified the Sheriff's Department, and turned in Mrs. Muncey's date of birth and her picture, which Mr. Muncey had given him. Mr. Wallace then worked all night, talking to neighbors and other people, trying to find Mrs. Muncey.

Mr. Wallace was present at the site where the body was found the next day, when "Little Hube" arrived. Mrs. Muncey's body was down an embankment, and there were a lot of people there. "Little Hube" was driven there by Mr. House. According to Mr. Wallace, when "Little Hube" arrived, he got out of the car and Mr. House ran in front of him, grabbed him, and held him back; they were looking back at where the body was. "Little Hube" did not seem to be upset.

Mr. Wallace had known "Little Hube" a long time and, for as long as he had known him, "Little Hube" had a reputation for drinking heavily. In Mr. Wallace's opinion, "Little Hube" is an alcoholic. "Little Hube" was drinking that morning when Mr. House brought him to where Mrs. Muncey's body was.

Lora Tharp, the Munceys' daughter, testified she was ten at the time of her mother's murder. That night she was home with her mother and brother. While in bed, she heard a deep voice saying her dad had been involved in a wreck next to the creek. Sometime later she and her brother got up and went looking for their mother. They went to the neighbors and looked up and down the driveway. She did not see anything out of the ordinary in the house; nothing was out of place and there was no sign of a struggle.

According to Ms. Tharp, her parents got along fine. They argued, but she did not recall any physical pushing or hitting. If they argued, she could hear them if she was in her bedroom. The family did not have air conditioning in the home. She did not hear any arguments that night.

The court found Ms. Tharp a very credible witness. She had no reason to lie. Her testimony during the evidentiary hearing was consistent with her trial testimony.

"Little Hube" Muncey testified that, on the Saturday his wife disappeared, he had helped dig a grave earlier in the day and then went to the dance without going home. Mr. Muncey's father was there where they were digging the grave. He also saw Gary Muncey that day. He stopped by Betty Herron's house that day; he usually stopped there every day to speak to them. That day he stayed for a couple of hours because he "would stop and talk to B. Wyrick and things every day" and they "would drink a few together." [Court File No. 276, p. 55].

The admission price to the dance was one dollar. Back then, the beer Mr. Muncey drank did not cost over two dollars a six-pack. Mr. Muncey testified that he got the money for the dance and to buy beer from odd jobs he would do.

According to Mr. Muncey, he went to these dances on a regular basis. Although he did not recall leaving and coming back to the dance that night, sometimes during a dance he would run up to the package store and come back.

The dance ended around midnight. Mr. Muncey drove straight home and saw the door standing partially open. That was not normal and caused him some concern. The windows were open, because the house was not air-conditioned, and the kitchen light was on.

According to Mr. Muncey, he went in and looked around, saw his kids in the bedroom but his wife was not in the bedroom. He looked around outside for her, because they did not have an inside bathroom, but she was not out there. He asked his children where their mother was, but they did not know. He got the kids and went to a neighbors' home to see if they had seen Mrs. Muncey. He, or someone at his request, called the authorities from the neighbors' and told the authorities his wife was missing. He then took his kids to his dad's house.

According to Mr. Muncey, his wife sometimes went to the dance with him, but that night he was already out and just stopped by. His wife did not mind him going to the dance without her. He had been drinking beer all day long but was not drunk. During that

time period, he would drink a few cans of beer on the way home from work and would drink quite a lot on week-ends. His wife did not object to his drinking. Although he and his wife had a few quarrels, their fights did not get physical in terms of pushing, shoving, or hitting.

Mr. Muncey testified that he dated Kathy Parker before his marriage, but not afterwards. He did not remember being at a gathering at either Ms. Parker's house or Ms. Letner's house around the time of the trial. During that time Mr. Muncey was drinking six to twelve beers every day. He denied ever telling anyone he was responsible for his wife's death and he denied that he killed his wife. He denied he was supposed to take his wife fishing that night instead of going to the dance.

Mr. Muncey denied seeing either his wife or Mary Atkins at the dance the night his wife disappeared. He recalled going by Ms. Lawson's house the next morning but did not recall asking her to say he was at the dance. He denied telling Ms. Miller several months before Mrs. Muncey's death that he was going to get rid of his wife.

Mr. Muncey went to school for four years. He farmed for a living, working for other people. The Munceys rented the house they lived in. The house did not have

running water; the hand pump to the well was torn up and they had to haul water from his father's or from the spring.

Mr. Muncey testified that he arose early the morning of Mrs. Muncey's murder. He and his wife had intimate relations that morning. Mr. Muncey thought he had informed the Tennessee Bureau of Investigation (TBI) about the couple's sexual relations. In the court's opinion, the fact that Mr. and Mrs. Muncey had sexual intercourse the morning of her murder suggests that there was at least a modicum of compatibility between the two of them.

Pam and Jerry Luttrell, who lived across the street from the Munceys, had a garden. Mr. Muncey denied knowing that his wife "would pick beans on the half" from the Luttrell's garden and sell them. [*Id.* at 57]. Mr. Muncey denied causing an argument with his wife that Saturday by taking the money she earned from picking beans and using it to buy beer and for admission to the dance.

At the time of Mrs. Muncey's death, Mr. Muncey weighed about 120 to 130 pounds; he's five eight and now weighs about 135 pounds. Petitioner submitted a picture of Mr. Muncey taken around the time of his wife's murder. [Petitioner's exhibit 36]. His wife was five six and weighed about the same as he did. She was as strong as he was.

The petitioner, Paul Gregory House, testified that, on Saturday, July 13, 1985, he was living with his girlfriend, Donna Turner, at her trailer. He helped his mother move during the morning or afternoon, then came back to the trailer where he stayed the rest of the day. Between 10:30 and 11:00 p.m., while Donna was ironing clothes and he was watching television, he decided to go for a walk. That was not something he would regularly do. He did not intend to go anywhere in particular. Mrs. Muncey's body was found 1.8 miles from where Mr. House lived.

Mr. House walked across the property down to the road and then to the left, away from the Muncey house. After he had been walking about 20 minutes, a truck pulled up behind him. There were at least two guys in the truck. The driver got out, said something, grabbed Mr. House by the arm, and started to jerk him around. Mr. House turned around and threw back with his left hand, hitting the driver. The driver let go and Mr. House starting running. He ran into some trees and heard at least one shot, maybe two. He ran through the woods for awhile.

When Mr. House came out of the woods onto the road, he knew where he was and headed back to Ms. Turner's house. He noticed he had lost a tennis shoe while running; he took the other one off and threw it because he was upset. When he got to the trailer, he noticed his shirt was missing. The front door to the trailer was locked. He knocked

on the side door and Ms. Turner let him in. He was sweating and breathing hard, and drank a soft drink to cool off. Mr. House thought he was gone from the trailer for about an hour.

Ms. Turner had locked the door because she thought Mr. House had gone to his mother's home. Ms. Turner said the two of them had been fighting, but Mr. House did not recall having an argument with her. Mr. House told Ms. Turner about the incident with the men in the truck.

The next day, Sunday, Mr. House heard that Carolyn Muncey was missing. Ms. Turner told him she had seen "Little Hube" drinking, so he went looking for "Little Hube" because he considered him a friend. He borrowed Ms. Turner's car, drove down Ridgecrest Road, missed the Muncey driveway and drove past it to Tazewell Pike, turned around and drove past the Muncey driveway again, and pulled in a dirt road. He parked there, got out, ran back, and looked up the Muncey driveway. When he saw the car was not there, he walked back to Ms. Turner's car. He then drove toward Tazewell Pike intending to go to a dead-end dirt road where people went to drink, thinking "Little Hube" might be there.

On the way, he saw Bill Hensley coming toward him in a blue car. Mr. House waved Mr. Hensley over and asked him if he had seen "Little Hube." Mr. Hensley said he hadn't seen him around there anywhere. Mr. House then pulled into the Muncey driveway, backed out and drove back down Ridgecrest Road to the dump. There were two men there dumping garbage, but they did not know "Little Hube." Mr. House then went to his mother's house.

Mr. House was questioned by TBI Agent Ray Pressnell on Sunday and by TBI Agent Charles Scott on Monday. He admitted that he lied to the TBI agents when he told them he never left Ms. Turner's home Saturday night, and that he lied when he told Sheriff Loy during questioning that he had on the jeans he was wearing Saturday night.

Mr. House did not tell Sheriff Loy or the TBI agents about being harassed by some guys in a truck and shot at that Saturday night. He did not recall telling his lawyer about the incident, either. Mr. House testified he lied to the TBI and sheriff because he was on parole and did not want to draw attention to himself.

Mr. House did not try to find his shirt because he did not know where he had lost it. According to Mr. House, the bruises and scratches on his hands came from te- -g down a shed sometime before Mrs. Muncey's murder.

Mr. House denied being down in the ditch where Mrs. Muncey's body was found. He testified that "[t]he closest I got to what you call the embankment was when I ran up from the dirt road up to the Clinton's driveway, looked up and saw Little Hube's car was not there and walked back on the other side of the road." [Court File No. 276, p. 98]. Mr. House testified that he parked on the dirt road and ran back to the Muncey's driveway, instead of driving to it, because he "didn't like driving on the narrow roads that much to start with." [*Id.*].

When asked specifically whether he had anything to do with Mrs. Muncey's murder, Mr. House answered: "No, I did not." [*Id.* at 107]. When asked whether he was involved in a sexual assault of Mrs. Muncey, he answered: "I did not kill her. I did not ever contemplate killing her. I did nothing to her other than be an acquaintance, I guess." [*Id.*].

Mr. House did not testify at his criminal trial, either during the guilt phase or the penalty phase, nor did he testify during post-conviction proceedings. His testimony in this proceeding marked the first time he has testified in a court of law with respect to Mrs. Muncey's murder. The court considered Mr. House's demeanor and found that he was not a credible witness.

Joe Ed Munsey testified by deposition. [Petitioner's exhibit 34a]. He was the assistant chief of police with the Maynardville Police Department at the time of Mrs. Muncey's murder. On the Sunday the body was found, Mr. Munsey was notified by dispatch that the Union County Sheriff's Department needed assistance on a homicide. He went to the sheriff's department and viewed the body.

Mr. Munsey did not interview any witnesses. He did not recall whether he helped package the evidence. He did accompany Bill Breeding when he took the evidence from the Union County Jail to the FBI crime laboratory in Washington, D.C. Mr. Munsey had no independent recollection of how the evidence was packaged or the circumstances under which the evidence was turned over to the FBI.

According to Mr. Munsey, "Little Hube" was a suspect in the case because he had a serious drinking problem and did not treat his wife very well. That was common knowledge in the community.

Charles W. McClure, Jr. testified by affidavit. [Petitioner's exhibit 34d]. At the time of Mrs. Muncey's murder, he was a Union County deputy sheriff. His only involvement in the case was to transport evidence from the Oak Ridge Hospital to the sheriff's department.

William Franklin Breeding testified by affidavit. [Petitioner's exhibit 34b]. At the time of the murder, he was an investigator with the Union County's Sheriff Department. He became involved in the case the day the body was found. The TBI had already been called in and he considered himself assisting the TBI.

The first thing Mr. Breeding did was go to the funeral home. He remembered collecting Mrs. Muncey's clothing as well as some hairs that she had in her hands; he thought he might have taken some photographs. He did not recall how he packaged the evidence to go to the laboratory or where the evidence was kept after it was packaged.

Mr. Breeding recalled interviewing several witnesses. He took pictures of Mr. House's abrasions on Sunday evening, the day the body was discovered. He thought he might have collected some physical evidence from Mr. House, such as hair and blood samples, at a later date. He also drove the evidence to the FBI crime laboratory in Washington, D.C. As far as Mr. Breeding recalls, he left for Washington late Tuesday following the murder and delivered the evidence the next morning, which was Wednesday, July 17, 1985.

TBI Agent Ray Pressnell testified by affidavit. [Petitioner's exhibit 34c]. He became involved in the case the day Mrs. Muncey's body was found. He interviewed Mr. House that evening and afterwards talked with others in the community. He also collected hair samples and fingerprints from Mrs. Muncey at the funeral home. Mr. Pressnell did not recall who collected Mrs. Muncey's clothing or how the evidence was packaged.

TBI Agent Charles Scott testified that he became involved in the investigation of Mrs. Muncey's murder, at the request of another agent, on the second day of the investigation. He took a statement from Mr. House and obtained a consent to search from Ms. Turner. He went to Ms. Turner's home and seized a pair of blue jeans from the clothes hamper in the bathroom. The jeans had "reddish brownish" stains that he suspected was blood on the upper part of the jeans and near the cuff; there was also some light colored mud that was not completely dry. [Court File No. 276, pp. 113-114 & petitioner's exhibit 17 (actual exhibit withdrawn and photographs of front and back substituted)].

Mr. Scott did not thoroughly examine the jeans at that time but rather folded them and put them in a paper bag. Mr. Scott did not recall ever seeing the jeans in a plastic bag.

Mr. House's trial attorney, Charles Burks, testified on behalf of petitioner. Prior to Mr. Burks' testimony, Mr. House's present counsel referred the court to diagrams and maps of the general location of the murder. [Petitioner's exhibits 1-4]. Mr. Burks identified the area, including the location where the body was found and the Muncey home, through a series of photographs that he had taken [petitioner's collective exhibit 11-1 through 11-11], as well as photographs taken by present counsel [petitioner's collective exhibits 27-1 through 27-6].

Mr. Burks has been practicing law since 1974. He was retained to represent Mr. House on the first degree murder charge. The theory of the defense was that Mr. House did not commit the crime. During his investigation of the case, Mr. Burks learned that "Little Hube" and his wife were not getting along and that the whereabouts of "Little Hube" that night were in question. "Little Hube" was a suspect in Mr. Burks' mind.

According to Mr. Burks, "Little Hube" was generally absent throughout the whole process: he did not appear at the preliminary hearing or the trial, and he did not testify at either hearing. Mr. Burks attempted to talk with "Little Hube;" he met with "Big Hube" ("Little Hube's" father), who told Mr. Burks that "Little Hube" had nothing to say and would not talk with him. Mr. Burks filed the appropriate discovery motions and motions for exculpatory evidence.

Mr. Burks testified that the State's proof was there was a sexual assault involved in the murder. Although Mr. House was not charged with rape or kidnapping, those were noticed by the State as aggravating factors. The State introduced, over objection, evidence of semen. Also, the State introduced the testimony of Billy Ray Hensley as to what he saw, as well as proof of the bruises and scratches on Mr. House, his statements to the TBI, and the blood on his blue jeans.

During the evidentiary hearing, Mr. Burks reviewed a report from the Forensic Services Department of the TBI , which referred to Mr. House's tennis shoes and indicated the absence of blood on the tennis shoes. [Petitioner's exhibit 6A]. Mr. Burks did not recall having seen that report before. That would have been relevant to Mr. Burks because, although there was blood on Mr. House's jeans near the cuff, there was no blood on the shoes he was wearing at the time of the offense. The shoes were found in the general area of Ms. Turner's trailer long after the murder.

Mr. Burks was shown a plastic bag with the notation "Blue jeans, number 1, 7-15-85 1:30 p.m., Donna Turner's residence Charles D. Scott, TBI, TBI case number 58-107." [Court File No. 275, p. 145 & petitioner's exhibit 24 (actual exhibit withdrawn and photographs substituted)]. The bag appeared to have blood stains on it. Mr. Burks was never shown that bag and did not know it existed. If he had known it existed, he would

have introduced it at trial and argued possible contamination. He also would have had it examined by his expert prior to trial. Mr. Burks testified that the plastic bag and the report on the tennis shoes were the type of information he sought pursuant to his discovery motion.

Mr. Burks was shown four pictures of the deceased. [Petitioner's collective exhibit 13(1-4)]. Mr. Burks had not seen those pictures before, although they would have been the type of discovery he was seeking. Had he seen those pictures, he would have discussed them with his consulting pathologist, Dr. Joe Parker. Mr. Burks had seen the autopsy report from the forensic pathologist [petitioner's exhibit 6-5] and did not recall any reference to the pictures in that report.

Mr. Burks was shown several TBI Memoranda, the subject of which was Carolyn Muncey. Mr Burks did not recall seeing any of the Memoranda before, although they contained the type of information he sought in discovery.

One Memorandum summarized the interview of Kathy Parker by TBI Agent Ray Pressnell. [Petitioner's exhibit 6a]. Ms. Parker quoted "Little Hube" as telling three men his wife was home and they could go get her because he did not care anymore. Mr. Burks

testified that if he had seen the Memorandum he would have pursued Ms. Parker as a witness.

Another Memorandum summarized an interview Agent Pressnell and Sheriff Loy had with Peggy Herron. [Petitioner's exhibit 6b]. According to the Memorandum, Ms. Herron's husband, J.B., had helped "Little Hube" look for his wife early that Sunday morning. When J.B. returned around 4:00 a.m. he told Ms. Herron that the Munceys' daughter "said that Jack Beeler came to the house and told Carolyn that [Mr. Muncey] had a wreck in his car." This information would have been important to Mr. Burks because Lora Muncey was the only witness who had heard the voice of whomever called her mother out of the house that night.

In addition, the Memorandum quoted Ms. Herron as saying Mr. Muncey had called Mrs. Muncey "a bitch and a slut recently," he had slapped Mrs. Muncey a year ago at Ms. Herron's house, and had hit Mrs. Muncey with his fists a year ago at a barbecue at his house. Mr. Burks would have used that evidence at trial to suggest that someone other than Mr. House had a motive for Mrs. Muncey's murder.

Mr. Burks was shown the TBI Memorandum summarizing the interview of Gary Muncey by Agent Pressnell and Sheriff Loy, in which Gary Muncey stated he saw Hubert Muncey, Jr. at the dance Saturday night. [Petitioner's exhibit 6d]. Prior to the trial, Mr. Burks was trying to determine the whereabouts of "Little Hube" the night of the murder and was not aware he was at the dance nor was he aware how the dance related to Carolyn Muncey.

Hubert Muncey, Sr. was interviewed by Special Agent Charles Scott. [Petitioner's exhibit 6e]. "Big Hube" stated that, on the Saturday in question, his son helped him dig a grave, ate supper with him, and left at approximately 8:00 p.m. to go to the dance. Again, that would have been relevant to Mr. Burks in trying to establish the whereabouts of "Little Hube" that day.

William Hubert Muncey, Jr. was also interviewed by Agent Scott along with Union County Detective William Breeding. [Petitioner's exhibit 6g]. This Memorandum would have been important to Mr. Burks because "Little Hube" admitted leaving the dance to go to the package store around the time of his wife's death.

In addition to the TBI Memoranda, Mr. Burks was shown two pages of handwritten notes from the TBI file on Carolyn Muncey, neither of which he had seen before. The first referenced the fact that Mrs. Muncey last had sexual relations with her husband Saturday morning, the day she disappeared from home. [Petitioner's exhibit 6f]. According to Mr. Burks, that would have been important to know because during the trial the State introduced evidence of semen on Mrs. Muncey's clothes and evidence of petitioner's secretor status.

The second note referenced the fact that Mrs. Muncey's children came to the home of Mike and Patricia Clinton around 10:35 p.m., trying to find their mother. [Petitioner's exhibit 6h]. That information would have assisted Mr. Burks with respect to the time Mrs. Muncey left her house with her assailant.

There was some confusion whether Mr. Burks was actually given the above TBI Memoranda and notes. The State was under the impression that the documents were in Mr. Burks' file. However, apparently when counsel for Mr. House copied Mr. Burks' file for the State, the TBI documents were inadvertently copied as well and included with the file.

Mr. Burks did acknowledge, after reviewing his file, that he in fact interviewed "Little Hube" and learned he had been at the dance. He also interviewed Ms. Herron, who told him the Munceys' daughter had said different things at different times and also told him about physical altercations between Mr. and Mrs. Muncey. Mr. Burks could not recall why, as a matter of strategy, he decided not to use Ms. Herron as a witness.

Mr. Burks reviewed the notes of his initial interview with Mr. House. [Respondent's exhibit 25]. Mr. House did not tell Mr. Burks that he had left Donna Turner's trailer that night. Ms. Turner first told police that Mr. House was at her trailer all night. She later recanted. Mr. Burks admitted that Ms. Turner's changing her statement was very damaging to the defense. Mr. Burks' notes also reflect that the pictures of Mr. House's cuts and bruises were taken on both the Sunday and the Wednesday following Mrs. Muncey's murder.

Mr. Burks recalled that during the trial his client spoke out in front of the jury. That concerned Mr. Burks because Mr. House has a deep voice and the daughter had testified that whoever called her mother out had a deep voice.

Mr. House did not testify at either the penalty phase or sentencing phase of the trial. According to Mr. Burks', throughout the course of his representation, Mr. House was adamant he was innocent of the murder. Remorse is a mitigating factor the jury may consider in sentencing. Mr. Burks testified that, since the jury had found Mr. House guilty and since Mr. House would not exhibit remorse for the murder, Mr. Burks recommended Mr. House not testify at sentencing. Instead, his mother testified on his behalf at sentencing.

As stated above, the court in this proceeding found Mr. House was not a credible witness. Thus, the court understands Mr. Burks' recommendation that his client not testify before the jury.

Larry Johnson, a detective with the Knox County Sheriff's Department, testified on behalf of Mr. House as an expert in the area of crime scene investigation. In Detective Johnson's opinion, the packaging of materials in the case did not meet professional standards. That opinion was based upon a review of reports as well as photographs of the packaging materials shown him by petitioner's investigator. [Petitioner's collective exhibit 33].

According to Detective Johnson, it appeared that all of the evidence, although separately wrapped, was placed into one container for either transportation or shipment. Detective Johnson testified that all samples, such as victim's clothing and suspect's clothing, or victim's blood and suspect's blood, should be kept separated, labeled and sealed to avoid any transfer of evidence.

Detective Johnson testified that Mrs. Muncey's bra and housecoat should not have been placed in the same paper bag because of the danger of transfer. He also testified that her underwear should not have been placed in a plastic container because plastic draws moisture and does not allow the material to breathe. If the clothing item contained body fluids such as blood or semen, the composition of the fluids starts breaking down.

Detective Johnson had also been told that one of the blood samples had come unsealed in transport and had been shown a picture of a vial that the cork had come out of. However, Detective Johnson did not see the evidence at the time it was packaged for shipment to the FBI laboratory and had not talked with any of the people who packaged the evidence for shipment. Detective Johnson did not know when the cork actually came out of the blood vial.

Detective Johnson further testified as to the importance of maintaining the integrity of the crime scene by keeping people away. Based upon his review of photographs of the roadway next to the crime scene [petitioner's collective exhibit 12], he saw several non-law enforcement people present. However, he did not know how many people were actually at the crime scene itself.

Lisa Calandro also testified as an expert witness on behalf of Mr. House. She works for Forensic Analytical in Hayward, California, and is supervisor of the DNA section, which does forensic DNA analysis and biological evidence analysis. Ms. Calandro was involved in testing for semen stains on Mrs. Muncey's clothing, specifically her housecoat [petitioner's exhibit 14a (actual exhibit withdrawn and photographs of front and back substituted)], her nightgown [petitioner's exhibit 15a (actual exhibit withdrawn and photographs of front and back substituted)], and her underwear.

Semen was found on Mrs. Muncey's underwear and nightgown. Ms. Calandro was provided with samples of Mr. House's blood. As a result of DNA testing, he was eliminated as the donor of the semen.

Ms. Calandro also examined the plastic bag in which Mr. House's blue jeans were stored. [Petitioner's exhibit 24 (actual exhibit withdrawn and photographs substituted)]. She found blood stains on the exterior of the bag, but not on the interior of the bag.

Howard Bragdon, manager of laboratory operations for DCI Laboratory in Nashville, Tennessee, testified on behalf of Mr. House. DCI was formerly DiaClin Laboratory, Inc., and was the laboratory that Mr. House's trial attorney, Mr. Burks, used for blood comparison and analysis. According to the property receipt, on October 29, 1985, Mr. Bragdon took possession of the following items from the TBI: the blue jeans; Mrs. Muncey's nightgown, bra, housecoat, and panties; Mrs. Muncey's fingernail scrapings; samples of Mrs. Muncey's and Mr. House's blood; and a piece of plastic. [Respondent's exhibit 11].

Mr. Bragdon transported the evidence back to Nashville and secured it until the following morning when the materials were distributed for testing. That day, Mr. Bragdon took photographs of the tubes of blood samples and the container in which they were packaged. [Petitioner's collective exhibit 8]. The photographs showed dried blood around the edges of the left upper corner of the box and dried residue on the top of one of the tubes.

Mr. Bragdon testified that, at the time, DiaClin was heavily involved in paternity testing. The laboratory regularly transported blood and was not accustomed to mishandling the blood. However, Mr. Bragdon admitted that it was his custom to inspect the condition of serological evidence when he took possession and that there was no notation on the receipt of spillage. Mr. Bragdon also admitted that he had no way of knowing the condition of the blood samples at the time of the FBI's serological testing.

Mr. House's next expert witness was Dr. Cleland Blake. Dr. Blake is a forensic pathologist, an assistant State Chief Medical Examiner, and a consultant in forensic pathology to the TBI. His opinions were based upon his review of the TBI file, including the autopsy report [petitioner's collective exhibit 6], the FBI file [petitioner's collective exhibit 7], photographs of the physical evidence [petitioner's collective exhibits 33(1) - 33(9)], photographs of the victim [petitioner's collective exhibits 13(1) - 13(4)], and photographs of Mr. House's bruises and abrasions which were taken from the state court record [petitioner's collective exhibits 9(1) - 9(7) & 9(9)].

The autopsy of Mrs. Muncey was performed by Alex G. Carabia, M.D. Dr. Blake had several criticisms of the terminology used in the autopsy report, such as Dr. Carabia's use of the term "abrasion" instead of "laceration" and his reference to reflection o. : "skull cap" rather than reflection of the "scalp." [Court File No. 275, pp. 33-36]. Dr.

Blake also criticized the fact that photographs were not taken during the autopsy. Nevertheless, Dr. Blake essentially agreed with Dr. Carabia's conclusion that Mrs. Muncey's death was caused by a blow to the left side of her head, which resulted in a contrecoup injury of subdural hematoma to the right side of her brain.

The blow to the head was in the general area of the laceration on Mrs. Muncey's left temple, visible in one of the photographs of the victim. [Petitioner's exhibit 13(3)]. Other photographs shows blood staining on both sides of Mrs. Muncey's clothing. [Petitioner's exhibits 13(2), 14a, & 15a]. The photograph of the body where it was discovered shows Mrs. Muncey lying on her right side. [Petitioner's exhibit 13(1)]. According to Dr. Blake. the laceration would have spurted blood, although not a great amount. In Dr. Blake's opinion, at some point after the blow, Mrs. Muncey was erect, either sitting or slouched vertical. That is how the blood came to be on her left side. After she was placed in the ditch, blood drained down to her right side, staining her clothes on that side.

In Dr. Blake's opinion, the blow to Mrs. Muncey's head was not consistent with a blow from a fist. Rather, she was struck with a hard, sharp object.

Dr. Blake found fault with Dr. Carabia's handling of the blood and other biological specimens. Dr. Blake testified that there was no total chain of custody. Also, according to Dr. Blake, Dr. Carabia failed to refrigerate and preserve the blood in the tubes, failed to seal the tubes of blood, which could result in spillage, and failed to package the items individually.

Dr. Blake's testimony was based upon his review of photographs of the physical evidence, [petitioner's collective exhibit 35], and was relevant to Dr. Blake's opinion that the blood on petitioner's blue jeans resulted from spillage of Mrs. Muncey's blood in the laboratory tubes. Dr. Blake admitted there was nothing in the FBI report to indicate any blood spillage or leakage, only that the blood had undergone hemolysis, which could have occurred due to the fact there was no preservative in the tubes. Also, Dr. Blake admitted he could not tell exactly when the spillage occurred.

Dr. Blake reviewed the genetic marker analysis summary, which was prepared by the FBI as a result of that agency's examination of known specimens of Mrs. Muncey's blood and the blood found on Mr. House's jeans. [Petitioner's exhibit 7-4-2, found at collective exhibit 7, tab 4, p. 2]. According to Dr. Blake, the same amount of enzymes deteriorated on the blue jeans as in the sample of Mrs. Muncey's blood. This conclusion

was based on the reference to "inc" which Dr. Blake took to mean "incomplete penetration of the enzyme." [Court File No. 275, pp. 116, 119].

Dr. Blake testified that if fresh blood had spilled on the blue jeans while Mrs. Muncey was alive, and then dried, the enzymes on the jeans would not have deteriorated to the same extent as the enzymes in the blood taken from Mrs. Muncey. From this, Dr. Blake concluded the blood was not spilled on the jeans while Mrs. Muncey was alive but rather came from the spillage of the test tubes.

Dr. Blake also testified with respect to the age of Mr. House's bruises, based upon photographs taken from the state court record. [Petitioner's collective exhibits 9(1) - 9(7) & 9(9)]. Dr. Blake estimated some bruises at one to two days old; others at five to six days old. Also, in Dr. Blake's opinion, the bruising on Mr. House's right ring finger was an injury from being mashed; it was not consistent with striking someone.

Meghan Clement appeared as an expert witness for the respondent. The parties stipulated that Ms. Clement is qualified as an expert in the area of forensic DNA analysis, that the blood taken from the cuff area of Mr. House's jeans had a statistical similarity to blood taken from Mrs. Muncey's daughter, and that the semen found on Mrs. Muncey's clothes came from Mr. Muncey.

Dr. Alex Carabia appeared for the respondent and testified that he was the pathologist who performed the autopsy on Mrs. Muncey. He agreed with Dr. Blake that Mrs. Muncey was killed by the blow to the left side of her head. Dr. Carabia did not believe the injury was consistent with Mrs. Muncey having fallen and hit her head against the edge of a coffee table.

Dr. Carabia testified that he drew blood directly from Mrs. Muncey's thoracic cavity with a syringe, poured the blood into a vacutainer tube, and put the cap back on the vacutainer tube. He did not seal the tubes. He put the specimens upright in a four by six box and placed the box in the postmortem refrigerator for safekeeping while he finished the post-mortem examination. He then took all the samples to the bacteriology department and placed them in a refrigerator to be picked up later.

Paul David Bigbee, a special agent with the FBI, testified on behalf of respondent as an expert in forensic serology. At the time of Mrs. Muncey's murder, Agent Bigbee was a supervisory special agent and forensic serologist at the FBI laboratory in Washington, D.C., and he conducted the serological tests in the case.

Agent Bigbee testified that, pursuant to FBI policy, if evidence is contaminated in any manner, such as by spillage or leakage, it will be sent back without having been examined. He did not recall any leakage or spillage of blood in the items submitted to him for examination.

Agent Bigbee was the one who prepared the genetic marker analysis summary [respondent's exhibit 6 (actual exhibit withdrawn and photograph substituted)] upon which Dr. Blake based his opinion that the blood on Mr. House's blue jeans was the result of spillage. He disagreed with Dr. Blake's conclusion. Agent Bigbee testified that results from the analysis of the blood on the blue jeans differed from the results of the analysis of the liquid blood. Also, according to Agent Bigbee, the term "inc" stood for "inconclusive," which in turn meant the enzyme was present but could not be conclusively grouped. [Court File No. 276, p. 140]. Agent Bigbee had no idea what Dr. Blake meant by "incomplete penetration." [*Id.*].

Agent Bigbee was shown the styrofoam box in which the evidence was shipped from the TBI to the FBI. [Petitioner's exhibit 22 (actual exhibit withdrawn and photographs 22a-c substituted)]. The box was wrapped on all four sides with orange Tennessee Crime Laboratory tape. The tape had been slit on each side where the top joined the bottom.

Depending on how the lid was placed on the bottom, the orange tape either lined up at the slit or was uneven.

Agent Bigbee admitted that he did not know when the orange tape was put on the box. The petitioner's theory was that, before the FBI received the styrofoam box, the tape was slit, the box opened, some blood spilled and contaminated the blue jeans, and then the top was replaced and resealed with more orange tape.

Paulette Sutton also testified as an expert witness on behalf of the respondent. Ms. Sutton is a licensed medical technologist and clinical laboratory scientist; she also holds a certificate in bloodstain pattern interpretation. The parties stipulated Ms. Sutton's expertise in blood spatter analysis. In preparation for her testimony, Ms. Sutton examined Mr. House's blue jeans, Mrs. Muncey's bra, nightgown and housecoat, the pair of tennis shoes, the styrofoam box and the various laboratory reports and case files.

Ms. Sutton testified in general as to different types of bloodstains: a transfer bloodstain which is blood that has been transferred from one bloody object or surface to another surface; a soaking type stain which either originates on the inside and soaks out, or originates on the outside and soaks in; a passive type stain or blood flow type stain; and a blood spatter which results from a source of blood being impacted. Ms. Sutton tested

the blue jeans and Mrs. Muncey's clothing for the presence of blood. She did not attempt to identify the blood.

Ms. Sutton marked with white arrows the areas she tested on the blue jeans. [Petitioner's exhibit 17 (actual exhibit withdrawn and photographs of front and back substituted; also respondent's collective exhibits 17a-b & 18a-h)]. She found a transfer bloodstain on the inside of the right pants leg, a small bloodstain on the inside waistband beside the button closure, and a transfer bloodstain inside the right pants pocket. In Ms. Sutton's opinion, these bloodstains could not have been the result of spillage because they did not soak through. Also, Ms. Sutton testified that the stains should have been localized if they were the result of spillage.

Ms. Sutton also found blood mixed with mud on the front left pants leg, the right knee, the lower left pants leg, the back of the lower right pants leg, and the left hip pocket. From that she concluded the blood stains could not have resulted from spillage because the blood and mud would have had to have spilled at the same time.

Ms. Sutton examined the styrofoam box. [Petitioner's exhibit 22 (actual exhibit withdrawn and photographs 22a-c substituted; also respondent's collective exhibits 19a-d, 20a-b, 21a-b, 22a, 23a-e, & 24a-e)]. Ms. Sutton testified that when the blood patterns on

the lid and container are matched in a continuous pattern, the evidence tape is misaligned; when the evidence tape is aligned, the blood patterns do not match. Thus, the spillage inside the container did not occur when the evidence tape was in alignment. Based upon this, the respondent suggests that the spillage occurred after the evidence box was received by the FBI and the items analyzed by Agent Bigbee.

Ms. Sutton also testified regarding the blood stains on Mrs. Muncey's clothing. The right front shoulder of the housecoat and the nightgown each had a blood flow soaking stain that was consistent with the position in which the body was found. The left shoulder and back of the housecoat had light staining which would indicate Mrs. Muncey was in a pool of blood for some time - but not a long time - because there was not a similar stain on the nightgown.

The surface of the housecoat and the nightgown had a few stains which Ms. Sutton classified as medium velocity impact spatter. According to Ms. Sutton, the initial blow to the head that caused the laceration would have caused a small amount of spatter in the area of the wound. The medium velocity impact spatters on the housecoat and nightgown were caused by a subsequent blow that caused the blood to fly away.

III. Conclusions of Law

The fact that several witnesses testified Mr. Muncey admitted killing his wife does not, without more, afford Mr. House relief. The Supreme Court has held that "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on habeas corpus." *Townsend v. Sain*, 372 U.S. 293, 317 (1963), *rev'd on other grounds*, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). *See also Armstead v. Maggio*, 720 F.2d 894, 896-96 (5th Cir. 1983) (district court did not abuse its discretion in refusing to consider the affidavit of another confessing to the crime); *Shaver v. Ellis*, 255 F.2d 509, 511 (5th cir. 1958) (a confession by another does not render a conviction void and subject to collateral attack).

In addition to a claim of actual innocence, a habeas petitioner must demonstrate "an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S. 390, 400 (1993). Thus, "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 404. Accordingly, the habeas petitioner must "show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

The court concludes that Mr. House has failed to demonstrate his actual innocence of the murder of Mrs. Muncey. Mr. House claims that Mr. Muncey was the one who actually killed Mrs. Muncey. For that, he relies on the testimony of witnesses who state they heard Mr. Muncey confess to the killing. The court is not impressed with the allegations of individuals who wait over ten years to come forward with their evidence. This is especially true when there was no physical evidence in the Munceys' kitchen to corroborate his alleged confession that he killed her there.

Mrs. Muncey's daughter, Lora, did not hear her parents argue that night, nor did she see any signs of a struggle. She did hear a man with a deep voice inform Mrs. Muncey that Mr. Muncey had been involved in a wreck. Because Mr. House testified at the evidentiary hearing, the court is cognizant of the fact that Mr. House has a deep voice.

Mr. House also relies on the leakage of Mrs. Muncey's blood in the styrofoam container. Without question, one or more tubes of Mrs. Muncey's blood spilled at some time. It is likely the spillage occurred prior to the receipt of the evidence by laboratory hired by Mr. House's trial attorney. Based upon the evidence introduced during the evidentiary hearing, however, the court concludes that the spillage occurred after the FBI crime laboratory received and tested the evidence.

Mr. House also relies on Dr. Blake's testimony regarding enzyme deterioration on the blue jeans. However, the enzyme deterioration, as well as Mr. Muncey's alleged confession and the blood spillage, does not negate the fact that Agent Scott saw what appeared to be bloodstains on Mr. House's blue jeans when the jeans were removed from the laundry hamper at Ms. Turner's trailer and that the blood was in fact from Mrs. Muncey.

In considering the respondent's motion for summary judgment, the court determined that Mr. House's claims of ineffective assistance of counsel, although procedurally defaulted, should not be barred until the conclusion of the evidentiary hearing because they are intertwined with his claim of actual innocence. *Bousley v. United States*, 118 S. Ct. 1604, 1611 (1998) ("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'") (citations omitted).

Mr. House having failed to demonstrate his actual innocence, his associated claims of ineffective assistance of counsel based upon counsel's failure to adequately investigate Mr. House's guilt or innocence and failure to call all available witnesses that would have benefitted the defense, failure to adequately investigate mitigating circumstances, and

failure to call appropriate witnesses or put on appropriate evidence during the penalty phase are barred on the ground of procedural default.

In addition to his claim that he is innocent of Mrs. Muncey's murder, Mr. House also alleges that he is "innocent of the death penalty." In order to demonstrate actual innocence of the death penalty, a habeas corpus petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992).

In imposing the death penalty, the jury found the State had established three statutory aggravating circumstances: Mr. House had a prior felony conviction involving the use or threat of violence; the homicide was especially heinous, atrocious, or cruel; and the homicide was committed while Mr. House was committing or attempting to commit or fleeing from the commission of rape or kidnapping.

Mr. House has not demonstrated any constitutional error that led to the imposition of the death penalty. The fact that it was not his semen on Mrs. Muncey's clothing does not negate the jury's finding that the murder was committed during the commission of kidnapping or during the attempted commission of rape or kidnapping. Moreover, either

of the two additional statutory aggravating factors - Mr. House's prior felony conviction and the nature of the homicide - were sufficient to support imposition of the death penalty under Tennessee law. Accordingly, the court concludes that Mr. House is not actually innocent of the death penalty.

IV. Conclusion

Mr. House is not entitled to relief under 28 U.S.C. §2254 and his petition for the writ of habeas corpus will be **DENIED**. The stay of execution previously entered in this matter will be **VACATED**. The petitioner having failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability **SHALL NOT ISSUE**. 28 U.S.C. §2253(c).

AN APPROPRIATE ORDER WILL ENTER :

James H. Jarvis
UNITED STATES DISTRICT JUDGE

ORIGINAL

FILED
MAY - 6 2005
OFFICE OF THE CLERK

No. 04-8990

IN THE
SUPREME COURT OF THE UNITED STATES

PAUL GREGORY HOUSE,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Did the Sixth Circuit err in applying this Court's decision in *Schlup v. Delo* to hold that petitioner's new evidence was insufficient to excuse his procedural default before the state courts?

2. What constitutes a "truly persuasive showing of actual innocence" pursuant to *Herrera v. Collins* sufficient to warrant freestanding habeas relief?

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OPINION BELOW

The opinion of the court of appeals that is the subject of this petition is published at 386 F.3d 668. (Pet. App. 1)

STATEMENT OF JURISDICTION

The judgment and opinion of the court of appeals were entered on October 6, 2004. (Pet. App. 1) Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254, which governs federal habeas corpus remedies for applicants in State custody, provides in pertinent part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —
>
> (A) the applicant has exhausted the remedies available in the courts of the State . . . .

STATEMENT OF THE CASE

I. Trial and Direct Appeal

Paul Gregory House (hereinafter "petitioner" or House) was convicted in 1986 for the first degree murder of Carolyn Muncey in Union County, Tennessee. The jury sentenced House to death after unanimously finding three aggravating circumstances: (1) that House was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person; (2) that the murder was

especially heinous, atrocious or cruel in that it involved torture or depravity of mind; and (3) that the murder was committed while House was engaged in committing, or was attempting to commit, rape or kidnapping. Tenn. Code Ann. §§ 39-2-203(i)(2), (5), and (7) (1982).

On direct appeal, the Tennessee Supreme Court summarized the evidence at trial:

> The victim of the homicide was Mrs. Carolyn Muncey, who lived with her husband and two young children on Ridgecrest Road in rural Union County, Tennessee. Mrs. Muncey was in her late twenties, and her children were about eight and ten years old at the time of her death on July 13, 1985.
>
> In March 1985 appellant Paul Gregory House was released from prison in Utah and moved to the rural community in which the Muncey family lived. There he resided with his mother and stepfather for several weeks, but in June he moved into a trailer occupied by his girl friend, Donna Turner, which was located about two miles from the Muncey home. Appellant did not own an automobile; but he was permitted to drive his mother's car from time to time, and he also drove Ms. Turner's car on some occasions.
>
> Other than doing occasional farm work for his stepfather, appellant does not appear to have been regularly employed. He did not testify at trial at either the guilt phase or the sentencing hearing. He was shown to have had one prior conviction for aggravated sexual assault, a charge to which he pled guilty on March 16, 1981 in Salt Lake County, Utah. Apparently he was placed on parole in that state, and supervision of his parole was transferred to Tennessee when he returned to this state. He was approximately twenty-three years old at the time of the homicide in this case.
>
> Mrs. Muncey disappeared from her home in the late evening of Saturday, July 13, 1985. Her badly beaten body was found on the following afternoon at about 3 p.m., lying partially concealed in a brush pile about 100 yards from her home.

Apparently the husband of the victim was not at home during the early part of the evening of July 13. Mrs. Muncey and her children visited a neighbor and left at about 9:30 p.m. to return to their home. Later the older child, Laura, awoke. She testified that she heard a voice which sounded like her grandfather making inquiry about her father. She also heard someone tell her mother that her father had been in a wreck near the creek. She heard her mother sobbing or crying as she left the house. When her mother did not return, the two children went to look for her at neighboring homes. Not finding her, they returned home and waited until their father arrived. Discovering that his wife was missing, he took the children back to the home of the neighbor where they had visited earlier in the evening and then called for members of his family to look for his wife.

When the body of Mrs. Muncey was discovered the next afternoon, she was dressed in her nightgown, housecoat and underclothing. Her body was badly bruised, and there were abrasions and blood giving every evidence that she had been in a fierce struggle. Apparently a severe blow to her left forehead had caused her death. It appeared, however, that she had also been partially strangled. A pathologist testified that the blow to her left forehead caused a concussion and hemorrhage to the right side of the brain from which she died, probably one to two hours after being struck. He testified that she probably would have been unconscious after having been struck. He estimated the time of her death at between 9 p.m. to 11 p.m. on Saturday, July 13, but emphasized that this was at best a rough estimate.

Appellant never confessed to any part in the homicide, and the testimony linking him to it was circumstantial. There was evidence showing that he knew Mr. and Mrs. Muncey and had been with them socially on a few occasions. Through defense proof there was testimony that Mrs. Muncey and her husband had been having marital difficulties and that she had been contemplating leaving him. There was no evidence to indicate that the appellant was aware of that situation, however, or that there had been any previous romantic or sexual relationship between him and the victim.

On the afternoon of Sunday, July 14, 1985, two witnesses saw the appellant emerge from a creek bank at the side of Ridgecrest Road at the site where Mrs. Muncey's body was later found concealed in the underbrush. He was wiping his hands with a dark cloth and was walking

toward a white Plymouth automobile, parked on the opposite side of the road, belonging to his girl friend Donna Turner. The two witnesses spoke briefly to appellant, all of them discussing the fact that Mrs. Muncey had disappeared. Later the two witnesses became suspicious of what they had observed and returned to the point where they had seen appellant emerge from the embankment. Looking down the bank, they found the partially concealed body of Mrs. Muncey. They promptly notified the sheriff.

Appellant later admitted that he had been in the area but denied that he had seen the body of Mrs. Muncey or had any knowledge of its presence. The dark rag which he had been using when first seen was never produced. It was the theory of the State, however, that this was a dark "tank top" or jersey which appellant was shown to have been wearing on the previous evening, July 13.

Appellant gave two statements to investigating officers in which he denied being involved in the homicide. In both of these statements he stated that he had been at Ms. Turner's trailer the entire evening of July 13 and that he had not left until the next afternoon when he went to look for Hubert Muncey after learning of the disappearance of the latter's wife.

On Sunday afternoon various witness [sic] observed that appellant had numerous scratches and bruises on his arms, hands and body, there being an especially significant bruise on the knuckle of his right ring finger. Appellant explained that these injuries had been sustained innocently earlier during the week, but when Ms. Turner was called as a witness, she said that she had not observed them prior to the evening of July 13. Appellant also told investigators that he was wearing the same clothes on Sunday, July 14 as he had been wearing the previous evening. It was later discovered, however, that a pair of blue jeans which he had been wearing on the night of the murder was concealed in the bottom of the clothes hamper at Ms. Turner's trailer. These trousers were bloodstained, and scientific evidence revealed that the stains were human blood having characteristics consistent with the blood of Mrs. Muncey and inconsistent with appellant's own blood. Scientific tests also showed that fibers from these trousers were consistent with fibers found on the clothing of the victim. There were also found on her nightgown and underclothing some spots of semen stain from a male secretor of the same general type as appellant.

> Some of the most damaging evidence against appellant was given by his girl friend, Ms. Turner. She at first told investigators that he had not left the trailer during the course of the evening of July 13. Later, however, she modified this testimony to state that he had been in the trailer until about 10:45 p.m. at which time he left to take a walk. She stated that he did not take her automobile. When he returned an hour or so later, he was panting, hot and exhausted. He was no longer wearing his blue jersey or his tennis shoes. The shoes were later found in an area different from the place where appellant told her he had lost them.
>
> Appellant told Ms. Turner that he had thrown away the navy blue tank top because it had been torn when he was assaulted by some persons who tried to kill him. It was after the appellant's return to the trailer that Ms. Turner first noticed the bruises and abrasions on his hands referred to previously.
>
> Appellant's mother testified that he had not used her automobile on Saturday evening. She testified that during Saturday and Sunday she had been planning to separate from appellant's stepfather and that appellant had been assisting her in her preparations for moving.
>
> At the sentencing hearing the State proved appellant's prior conviction for aggravated sexual assault. Appellant's parents testified that he came from a broken home and had been subjected to stress as a result of that experience. Appellant's mother also testified that in the interval between the guilt trial and the sentencing hearing appellant had attempted suicide. She read into evidence a letter which he had written to her denying his involvement in the homicide. Apparently he had cut his wrists while in the jail awaiting the sentencing hearing, but the degree and extent of the injuries were not detailed in evidence. They do not appear to have been serious and did not prevent his attending the sentencing hearing.

State v. House, 743 S.W.2d 141, 142-44 (Tenn. 1987).

The Tennessee Supreme Court affirmed House's conviction and death sentence. *Id.* at 144. After concluding that the evidence was sufficient to support both, the Court rejected House's numerous claims of trial error, save one. The Court determined that,

in proving House's prior violent felony conviction at the sentencing hearing, the State should not have been permitted to elicit testimony disclosing the length of his sentence for the prior offense and the fact that he was on parole at the time of the Muncey murder. The Court found the error to be harmless beyond a reasonable doubt, however, given the strength of the evidence establishing the three aggravating circumstances found by the jury, the "minimal proof of any mitigating factor," and "the fact that the State did not make any reference in closing argument to the length of [House's] prior sentence or to his parole status." *Id.* at 147.

II. State Post-Conviction Proceedings

In 1988, the state trial court denied House's first petition for post-conviction relief, in which he alleged, among several claims, that he had been denied the effective assistance of counsel at trial and sentencing. Following a hearing on the petition at which House elected not to introduce any proof other than the original trial transcript, the trial court denied post-conviction relief. On appeal, House raised only one claim — that an alleged error in the jury instructions at sentencing suggested that unanimity was required as to the existence of mitigating circumstances. House did not challenge the trial court's ruling on his ineffective assistance of counsel claim. The Tennessee Court of Criminal Appeals affirmed the judgment of the post-conviction court, and the Tennessee Supreme Court denied House's application for permission to appeal. *House v. State*, No. 28, 1989 WL 152742 (Tenn. Crim. App. Dec. 15, 1989) (app. denied Mar.

5, 1990).

In 1990, House filed a second state post-conviction petition, in which he again asserted an ineffective assistance of counsel claim. The trial court summarily denied post-conviction relief, agreeing with the State that all of the issues presented had either been previously determined in the first post-conviction proceeding or waived.[1] On appeal, the Tennessee Supreme Court affirmed, holding that "[t]he issue of ineffective assistance of counsel was . . . determined on the merits at the initial proceeding and the trial court did not err in dismissing this second post-conviction petition without a hearing." *House v. State*, 911 S.W.2d 704, 711 (Tenn. 1995).

III. Federal Habeas Proceedings — District Court

House initiated federal habeas corpus proceedings under 28 U.S.C. § 2254 in September 1996. Among his 56 claims were numerous allegations of ineffective assistance of counsel. In June 1998, the district court granted summary judgment in favor of the Warden on all but four of House's claims.[2] As to those four claims, the

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[1]Under Tennessee law in effect at the time of House's state post-conviction proceeding, the scope of a hearing in state post-conviction proceedings "extend[ed] to all grounds the petitioner may have, except those grounds which the court finds should be excluded because they have been waived or previously determined." Tenn. Code Ann. § 40-30-111 (1990) (repealed 1995). A ground for relief was held to be "previously determined" if a court of competent jurisdiction "has ruled on the merits after a full and fair hearing." Tenn. Code Ann. § 40-30-112(a) (1990) (repealed 1995). A ground for relief was "waived" if the petitioner "knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." Tenn. Code Ann. § 40-30-112(b)(1) (1990) (repealed 1995). By law effective May 10, 1995, the Post-Conviction Procedure Act was rewritten and replaced in its entirety by 1995 Public Chapter 207, § 1 (now codified at Tenn. Code Ann. § 40-30-101 et seq. (2003)).

[2]Each of the four remaining claims involved allegations of ineffective assistance of counsel, specifically: (1) ineffective assistance of trial counsel for failure to adequately investigate guilt innocence; (2) ineffective assistance of trial counsel for failure to call all available witnesses that would have benefitted the defense; (3) ineffective assistance of trial counsel for failure to adequately investigate mitigating circumstances; and (4) ineffective assistance of trial

district court further found that petitioner's DNA evidence related to the semen stain did not undermine any of the three aggravating circumstances found by the jury and rejected House's claim that he was "innocent of the death penalty." (Pet. App. 133-34)

IV. Federal Habeas Proceedings — Sixth Circuit Court of Appeals

On appeal to the Sixth Circuit, House asserted only two arguments, both of which related solely to the district court's procedural default determination: (1) Is a state procedural bar "firmly established and regularly followed" or applied "evenhandedly to all similar claims," where the intermediate state court of appeals rules that the alleged bar does not apply to the claims at hand, and where a higher court, on reversing that ruling, states that no clear rule has previously been applied? and (2) Assuming that Mr. House was required to establish "actual innocence" in order to obtain merits consideration of the constitutional errors infecting his judgment of conviction and sentence, did he meet that burden and is he entitled to relief?

On March 11, 2002, a three-judge panel affirmed the judgment of the district court in a 2-1 decision. *House v. Bell*, 283 F.3d 737 (6th Cir. 2002) (opinion withdrawn and vacated). That opinion was vacated on April 19, 2002, when the Sixth Circuit *sua sponte* ordered en banc rehearing. Following supplemental briefing and oral argument, the court decided, by a vote of 6-5, to hold House's case in abeyance while it certified three questions to the Tennessee Supreme Court, the stated purpose being "to ascertain whether there remains a 'state avenue open to process . . . [House's] claim' [of actual

innocence] in this case." *House v. Bell*, 311 F.3d 767 (6th Cir. 2002), *cert. denied*, 539 U.S. 937 (2003)). When the Tennessee Supreme Court declined to answer the questions certified on November 24, 2003, the case again returned to the Sixth Circuit for consideration of the two issues raised by House in his briefs to that court. *See supra* p. 9.

On October 6, 2004, the en banc Sixth Circuit affirmed the judgment of the district court denying federal habeas relief. The court first determined that federal habeas review of House's ineffective assistance claims was barred by an adequate and independent state-law ground. Having found House's ineffective assistance of counsel claims to be procedurally defaulted, the court then turned to his contention that the failure to consider the merits of his claim would result in a fundamental miscarriage of justice, *i.e.*, that a "constitutional violation has probably resulted in the conviction of one who is actually innocent of the crime" under *Schlup v. Delo*, 513 U.S. 298 (1995). Because the district court conducted an evidentiary hearing at which contested evidence was presented, the court of appeals examined both the evidence and the district court's related factual findings before concluding that House had failed to show that it is more likely than not that no reasonable juror would have convicted him. *Schlup*, 513 U.S. at 327. In performing that analysis, the court specifically deferred to the district court's resolution of credibility and factual disputes. *See Campbell v. Coyle*, 260 F.3d 531, 539 (6th Cir. 2001) ("We review the district court's conclusions of law in the application of

[§ 2254] de novo, and its factual findings are reversed only if they are clearly erroneous."). (Pet. App. 15)

As to focus areas of House's proof, the court of appeals concluded: (1) the fact that the semen found on the victim's clothes came from her husband and not from House does not contradict the evidence that tends to demonstrate that he killed her after journeying to her home and luring her from her trailer; (2) the testimony of two women who allegedly heard Hubert Muncey's "confession" to the murder was not credible, nor was the content of the confession supported by any evidence in the Muncey home where the supposed altercation with the victim took place; (3) by contrast, the testimony of the victim's daughter, who was present in the home on the night of her mother's abduction and murder, was credible and consistent with her trial testimony; (4) the district court's conclusion that the "spillage [of the vials of blood] occurred after the FBI crime laboratory received and tested the evidence" was not clearly erroneous; and (5) House's theory that the blood on his blue jeans came from vials of blood gathered at Carolyn Muncey's autopsy and not from his physical attack in the course of her murder was based upon a speculative theory about enzyme degradation that was contradicted by other evidence in the record. The court of appeals specifically noted that the unchallenged testimony indicating that the blood stains and mud on the petitioner's jeans were mixed supports the conclusion that House committed the murder. (Pet. App. 15-16)

The court further noted that the following facts implicating House remain undisputed:

> [House] lied to investigators about his whereabouts on the night of the murder; he gave inconsistent versions of the origins of the scratches and bruises on his hands and arms; he was seen near where the body was discovered on the day after the murder; he lied about what he was wearing on the night of the murder; blue jeans belonging to House, spattered with blood mixed with mud, were found at the bottom of Ms. Turner's laundry hamper; House has a deep voice and Laura Muncey testified that the man who came to the trailer on the night of the murder had a deep voice; and, according to Ms. Sutton [the State's blood spatter expert at the federal evidentiary hearing], the blood and mud found together on House's blue jeans had been mixed together, which "certainly eliminates the possibility of any stains being created by contamination in an evidence container."

(Pet. App. 15)

The court of appeals concluded that, "[d]espite his best efforts" in mounting a "concerted attack on his conviction," the "case against House remains strong." (Pet. App. 15-16) "We therefore conclude that he has fallen short of showing, as he must, that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." (Pet. App. 16)

ARGUMENT

I. CERTIORARI IS NOT WARRANTED BECAUSE THE SIXTH CIRCUIT'S ANALYSIS OF PETITIONER'S GATEWAY INNOCENCE CLAIM IS CONSISTENT WITH THIS COURT'S DECISION IN *SCHLUP V. DELO* AND FULLY SUPPORTED BY THE FEDERAL AND STATE COURT RECORDS.

Petitioner seeks certiorari review of the decision of the Sixth Circuit affirming the district court's dismissal of his federal habeas corpus petition. He specifically faults the Sixth Circuit's refusal to allow revival of his procedurally defaulted ineffective assistance of counsel claims based upon the "miscarriage of justice" exception enunciated by this Court in *Schlup v. Delo*, 513 U.S. 298 (1995). He contends that he presented to the district court a "compelling case of actual innocence" warranting review of his defaulted claims. (Pet., p. 16) To bolster his case for review, House asserts that the circuit courts of appeals have taken divergent approaches in analyzing *Schlup* gateway claims of "actual innocence" and that clari. :ation of *Schlup*'s "no reasonable juror" standard is needed. (Pet., pp. 17-20)

Certiorari is not warranted in this case, however, because the Sixth Circuit's analysis fully comports with this Court's decision in *Schlup* and correctly deferred to factual and credibility determinations made by the district court — sitting both as trier of fact at the federal evidentiary hearing and as a putative "reasonable juror" for purposes of *Schlup* — that were not clearly erroneous in light of the evidence presented. Under *Schlup*, a petitioner does not meet the threshold requirement to pass through the innocence gateway "unless he persuades the district court that, in light of the new

evidence, *no juror, acting reasonably*, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 329 (emphasis added). *Schlup* requires more than just the presentation of additional evidence purporting to establish a prisoner's innocence. For, as Justice O'Connor observed in her concurring opinion in *Herrera v. Collins*, 506 U.S. 390, 423 (1993), "when a prisoner's life is at stake, he often can find someone new to vouch for him. Experience has shown, however, that such affidavits are to be treated with a fair degree of skepticism. . . . [and] are suspect, produced as they were at the 11th hour with no reasonable explanation for the nearly decade-long delay." To pass through the *Schlup* gateway, the evidence presented must be both reliable and credible. *Schlup*, 513 U.S. at 324. And where, as in this case, that evidence is sharply contested in an evidentiary proceeding, a district court's credibility determinations are critical to determining whether a petitioner has met the burden imposed by *Schlup*.

Here, as the district court concluded, the evidence presented by House to support his claim, far from demonstrating his actual innocence, was countered and undermined in virtually every respect by opposing evidence presented by the State at the evidentiary hearing as well as the undisputed facts established at House's original trial. Indeed, the three primary components of House's case for "actual innocence" — the blood evidence, accounts of a drunken "confession" by the victim's husband, and House's version of the events on the night of the murder — were rejected by the district court as incredible, inconsistent with the uncontroverted evidence at trial, ebutted by other

expert and/or lay testimony presented in the federal evidentiary hearing, or some combination of all three. (Pet. App. 131-32) Moreover, the court of appeals' analysis of the issues before it was wholly consistent with this Court's precedent.

Because federal habeas review of House's ineffective assistance of counsel claim was barred by an adequate and independent state law ground, he was forced to look to the only exception available to him to revive his procedurally defaulted claim — that the failure to adjudicate his constitutional claim would result in a fundamental miscarriage of justice. *Schlup v. Delo*, 513 U.S. 298, 321 (1995). To ensure that the miscarriage of justice exception remains "rare" and would only be applied in the "extraordinary case," this Court explicitly tied the exception to the petitioner's actual innocence. *Id.* Thus, unless a petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial," "even the existence of a concededly meritorious constitutional violation is not itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." *Schlup*, 513 at 316.

To establish a miscarriage of justice, a petitioner must demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Id., at 321. To satisfy this heavy burden, a petitioner "must support his allegations of constitutional error with new *reliable evidence* — whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial." *Id.*, at 324 (emphasis added). The Sixth Circuit both

recognized and applied this standard in its analysis of House's claims. (Pet. App. 8, 15-16)

By definition, the *Schlup* standard for "actual innocence" cannot be met where, as in this case, the evidence of innocence is sharply contested and particularly where factual disputes and credibility questions are resolved *against* the petitioner by the trier of fact viewing the evidence and testimony in the first instance. The Sixth Circuit majority properly recognized that fact. The dissenting opinion did not. Indeed, the dissenting opinion was able to cast this case as the "rare or extraordinary case" of innocence only by assuming the truth of testimony and evidence that had been specifically discounted by the district court based upon that court's common sense assessment of the record as a whole.[4]

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[4]Likewise, House's petition to this Court is replete with affirmative statements of "fact" concerning the significance of the proof in the district court that are inconsistent with the factual determinations made by the district court itself. For example, House claims that "[p]owerful new evidence of innocence, including DNA evidence, proves that [he] was wrongly convicted of murder" (Pet., p. 2), a contention rejected as a matter of fact by both the district court and the Sixth Circuit. House claims to have been "cleared by DNA evidence, other scientific evidence, indisputable physical evidence and multiple eyewitness accounts." (Pet., p. 4) But even House admits there were no eyewitnesses to the murder (Pet., p. 5), and the district court specifically rejected his claim that the other evidence presented, scientific or otherwise, demonstrated his innocence of murder or of the death penalty. (Pet. App. 130-33) House claims to have "demonstrated that all of the physical evidence linking him to the crime . . . was either non-existent or patently unreasonable" (Pet., p. 16), a conclusion that has no support in the findings of the federal courts reviewing his claims. His contention, that "[p]ost-conviction testing of the blood evidence established that the victim's blood ended up on House's clothing . . . because either shoddy packaging allowed the blood to spill or two law enforcement agents deliberately placed the blood onto the clothing during transportation to labs" (Pet., pp. 17-18, 30), is patently inconsistent with the district court's finding that any spillage occurred after FBI laboratory had received and tested the evidence. (Pet. App. 131) In short, House's argument in support of certiorari is largely based on an exaggerated view of the evidentiary significance of the evidence without regard to the district court's assessment of its credibility and reliability in view of the record as a whole.

A habeas court reviewing an assertion of actual innocence does not write on a clean slate. *Cf. Barefoot v. Estelle*, 463 U.S. 880 (1983) ("Federal courts are not forums in which to relitigate state trials."); *Herrera v. Collins*, 506 U.S. 390 (1993) ("[I]n state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant); *Wainwright v. Sykes*, 433 U.S. 72 (1977) ("Society's resources have been concentrated at [the state trial] in order to decide, within the limits of human fallibility, the question of guilt or innocence of a crime."). The proper mode of analysis to be employed in assessing "new evidence" of innocence was described most precisely by Chief Justice Rehnquist in his dissenting opinion in *Schlup*:

> [T]he habeas court analyzing an "actual innocence" claim is faced with a body of evidence that has been supplemented since the original trial. The reviewing court must somehow predict the effect that the new evidence would have had on the deliberations of reasonable jurors. It must necessarily weigh this new evidence in some manner, and may need to make credibility determinations as to witnesses who did not appear before the original jury. This new evidence, however, is not a license for the reviewing court to disregard the presumptively proper determination by the original trier of fact.

Schlup, 513 U.S. at 340 (Rehnquist, C.J., dissenting).

Nor does the decision of the Sixth Circuit conflict with the decisions of other circuits on the same question. Indeed, many of the cases cited by petitioner are squarely in line with the Sixth Circuit's analysis in this case. For example, in *Fairman v. Anderson*, 188 F.3d 635 (5th Cir. 1999), the Fifth Circuit's determination that an eyewitness account of the murder was sufficient to demonstrate a gateway innocence claim under

Schlup was directly contingent upon the district court's "crucial credibility determination that [the witness] gave a trustworthy eyewitness account" in his testimony in the federal evidentiary hearing. *Id.* at 645. *Accord Wilkerson v. Cain*, 233 F.3d 886, 893 (5th Cir. 2000) ("The district court must hold an evidentiary hearing to assess the newly introduced [witness recantation] affidavits because there are reasons to doubt their reliability.").

In *Jaramillo v. Stewart*, 340 F.3d 877 (9th Cir. 2003), the Ninth Circuit reversed the decision of the district court dismissing the petitioner's habeas petition on grounds of procedural default and remanded the case to the district court to perform precisely the same analysis conducted by the district court in House's case — to determine whether the petitioner had presented sufficient *credible* evidence of actual innocence to excuse the procedural default of his constitutional claim. Although the court found that the new evidence, if credible, would demonstrate a miscarriage of justice under *Schlup*, it correctly concluded that "[t]here remains a question of the credibility of the proffered evidence. . . . The district court is in the best position to observe the witnesses . . . together with the other evidence available, and to make the ultimate credibility determinations." *Id.* at 883. The Ninth Circuit's rationale for remand is entirely consistent with the deference accorded the district court's findings in this case by the Sixth Circuit.

Petitioner's reliance on the decision of the Third Circuit in *Mattis v. Vaughn*, 80

Fed. Appx. 154, 2003 WL 22070528 (3rd Cir. 2003), as demonstrating confusion among the circuits is misplaced and improper, because the Third Circuit specifically designated its opinion in that case as not precedential. Likewise, petitioner's reliance on purportedly conflicting Sixth Circuit decisions lends no support to his petition to this Court, since intracircuit conflicts are a matter for en banc correction, not intervention by this Court on certiorari review. *Compare* Sup. Ct. R. 10(a) (certiorari warranted if a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter") *with* Fed. R. App. P. 35(a) (en banc hearing warranted if "necessary to secure or maintain uniformity of the court's decisions").

In sum, petitioner's contention that there exists confusion among the circuits in application of the *Schlup* gateway standard is simply not borne out by the cases he cites. The fact that courts may reach different results based upon their analyses of different evidence does not demonstrate a circuit split concerning the basic rule in *Schlup*. Because the Sixth Circuit properly concluded that House failed to demonstrate a fundamental miscarriage of justice as defined by this Court in *Schlup*, certiorari is not warranted under Sup. Ct. Rule 10(a).

II. CONSIDERATION BY THIS COURT OF A SUBSTANTIVE INNOCENCE CLAIM UNDER *HERRERA V. COLLINS* IS NOT WARRANTED BECAUSE THE QUESTION WAS NEVER PRESENTED TO, OR PASSED UPON BY, THE SIXTH CIRCUIT.

Following the lead of the dissenting opinion, petitioner asserts that certiorari is warranted to provide "clarification of the standard for freestanding claims of actual innocence" under *Herrera v. Collins*, 506 U.S. 390 (1993). In *Herrera*, this Court assumed — but only "for the sake of argument" — that "in a capital case a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Id.* at 417. Subsequently, in *Schlup*, the Court underlined the difference between a "substantive *Herrera* claim," under which the petitioner would have to produce evidence that "unquestionably establish[es] . . . [his] innocence" of the crime, 513 U.S. at 316-17, and a "procedural" or "gateway" claim of innocence, which "does not by itself provide a basis for relief," *id.* at 315, but is asserted to obtain federal review of otherwise procedurally defaulted claims.

Pointing to statistics outside the record of this case, which purport to show that "the actually innocent have been freed from death row in ever increasing numbers," House urges this Court to "announce a standard for *Herrera* claims" to "guide courts presented with freestanding innocence claims in capital cases." (Pet., p. 31, 33) However, House himself presented to the courts below only a gateway innocence claim under *Schlup*, not a substantive *Herrera* claim. Thus, even assuming a substantive

innocence claim would present a cognizable basis for habeas relief (an assumption contrary to the decision in *Herrera* itself), exercise of this Court's certiorari jurisdiction to consider the standard for assessing such a claim would not be appropriate, because the issue was never presented or passed upon in the court below.

This Court has "stated, repeated and reiterated the general rule that precludes a grant of certiorari when the question presented was 'not pressed or passed upon below.'" *United States v. Williams*, 504 U.S. 36, 58 & n.3 (1992) (Stevens, J., dissenting); *see also Duignan v. United States*, 274 U.S. 195, 200 (1927) ("This court sits as a court of review."). House raised only two issues in his appeal to the Sixth Circuit, both of which related solely to the district court's procedural default determination on his ineffective assistance of counsel claim: "(1) whether the Tennessee state courts applied the state waiver rule in such a way t it constituted an adequate and independent state ground that procedurally defaulted his ineffective assistance claims; and (2) whether, if his ineffectiveness claims were procedurally defaulted, he had made a sufficient showing of his actual innocence of the crime, permitting him to revive them." (Pet. App. 6) The Sixth Circuit specifically limited its determination to those two issues. (Pet. App. 1-2) ("House has limited his brief to a discussion of only two claims . . . . Having considered the arguments of the parties regarding the *two claims that are before us*, we affirm the district court's denial of the writ for the reasons set forth below.") (emphasis added).

Likewise, petitioner's application for a certificate of appealability presented only

a gateway innocence claim under *Schlup*: "[w]hether the District Court erred in finding that Mr. House had not established entitlement to proceed on his claims of guilt phase error . . . *under the 'actual innocence' exception to the procedural bar rule*. . . ." (emphasis added) A certificate of appealability "is a jurisdictional prerequisite" to appellate review of habeas claims. 28 U.S.C. § 2253(c)(1); *Miller-El v. Cockrell*, 123 S.Ct. 1029, 1039 (2003) ("The COA statute establishes procedural rules and requires a threshold inquiry into whether a circuit court may entertain an appeal"). In a habeas case, a court of appeals may certify for appeal only those issues with respect to which "*the applicant* has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (emphasis added). The court is further required to "indicate which *specific* issue or issues" raised by the applicant satisfy that required showing. 28 U.S.C. § 2253(c)(3) (emphasis added). House specified only two issues in his application to the Sixth Circuit, and, since he did not even attempt to make the showing required by § 2253(c)(2) as to any other issues, the court of appeals could not have found that he had met his burden as to other issues.

Even if House had included a freestanding actual innocence claim in his application for a certificate of appealability, he could not have succeeded in making a "substantial showing of the denial of a constitutional right" with respect to such a claim, as he would have been required to do by 28 U.S.C. § 2253(c)(2). *Herrera* itself makes clear that "[c]laims of actual innocence based on newly discovered evidence have never

been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. . . . [F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution — not to correct errors of fact." *Herrera*, 506 U.S. at 400. While *Herrera* hypothesized "for the sake of argument" that the Constitution might forbid the execution of one who proves his factual innocence, this Court has never held that such a constitutional right exists.

Finally, even if a *Herrera* claim had been properly certified and presented to the Sixth Circuit, House still would not be entitled to relief. The hypothetical innocence claim discussed by the Court in *Herrera* has three essential components: (1) that the petitioner is under a death sentence; (2) that the petitioner makes a "truly persuasive" demonstration of actual innocence of the capital offense after trial; *and* (3) that there is no state avenue open to process such a claim. *Herrera*, 506 U.S. at 417. Only the first of these components is satisfied in this case. As to the second, the factual findings of the district court, affirmed by the Sixth Circuit, concerning the credibility and weight to be accorded House's new evidence defeat any claim that he has mounted a "truly persuasive" demonstration of innocence. More importantly, however, under a plain reading of *Herrera*, the absence of state remedies is an element of a substantive innocence claim and a condition precedent to its assertion in federal habeas proceedings. *See Id.* ("[I]n a capital case a truly persuasive demonstration of 'actual innocence' made after

trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief *if there were no state avenue open to process such a claim.*") (emphasis added). Conversely, the *availability* of state remedies, as a matter of law, defeats any such claim. In *Herrera*, this Court specifically identified executive clemency as the "traditional remedy for claims of innocence based on new evidence." *Id.*, at 416-17. Because that remedy is unquestionably available to House under Tennessee law, he would be barred from asserting a substantive *Herrera* claim as a basis for habeas corpus relief even if such a claim were held to be cognizable. *See* Tenn. Code Ann. § 40-27-101 *et seq.* (2003) (Tennessee Governor has broad power to grant reprieves, commutations, pardons, and exonerations in all criminal cases after conviction).

Because House never properly presented a substantive innocence claim to the Sixth Circuit, and that court's decision does not rest upon the disposition of any such claim, certiorari is not warranted under Sup. Ct. Rule 10.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief in Opposition has been forwarded by First-Class U.S. mail, postage prepaid, on this the 6th day of May, 2005, to:

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I further certify that all parties required to be served have been served.

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No. 04-8990

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In the Supreme Court of the United States

PAUL GREGORY HOUSE,
Petitioner,

v.

RICKY BELL,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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EDITOR'S NOTE:

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INTRODUCTION

Respondent urges this Court to deny Paul House's petition even though *every* judge on the Court below, sitting *en banc*, concluded that Mr. House had established a colorable claim of actual innocence before the district court. *House v. Bell*, 386 F.3d 668, 684 (6th Cir. 2004)("Indeed, it is fair to say that he has presented a colorable claim of actual innocence"); *id.* at 690, Merritt, J., dissenting ("He has clearly shown both that a reasonable juror would have a substantive and serious doubt as to his guilt and that the cumulative evidence is insufficient to enable a rational juror to convict House or sentence him to death for the murder of Carolyn Muncey."). *See also, Schlup v. Delo*, 513 U.S. 298, 311 and 332 (1995)(adopting the *Carrier/Kuhlmann* standard). By the narrowest of margins, 8-7, however, the majority determined that Mr. House's evidence was not substantial enough to satisfy either *Schlup* or *Herrera*.

Respondent urges the Court to deny certiorari largely upon three points. First, it argues that the majority below properly deferred to district court fact-finding. We show that in several key respects, no such fact-finding occurred. Second, Respondent argues that the majority properly applied *Schlup*, and that there is no confusion below as to how *Schlup* is to be applied. We show that view is mistaken as well. Third, Respondent argues that the majority properly applied *Herrera*. Again we will show that the majority was mistaken and that certiorari is appropriate.

Paul House presented a compelling showing of innocence in the district court, a showing that satisfied the standards set forth in both *Schlup* and *Herrera*. But for the errors committed by the majority, he would have won review of his underlying claims. Without this Court's review, there is a very real chance that House will be executed.

The district court's fact finding wholly ignored ample record-based evidence of House's innocence and is not entitled the deference Respondent relies on.

Respondent claims in defense of the State of Tennessee's ongoing attempts to execute Mr House in terms of respecting state court and district court fact finding. He does nothing, however, to rebut the record evidence of Mr. House's innocence.

A. State court findings reached without consideration of new evidence are not entitled to deference.

Respondent, like the majority below, proffers a lengthy recitation from the direct appeal opinion as established facts requiring rebuttal. Both thereby ignore that neither the twelve persons who initially determined Mr. House's guilt, nor the Tennessee Supreme Court who reviewed the then-existing record to find evidence to support the jury's conclusion, were privy to the overwhelming evidence of Mr. House's innocence presented to the district court at the time they spoke so assuredly of the strength of the State's case for guilt. Accordingly, both also ignore *Schlup*'s directive that a court seeking to resolve a threshold claim of actual innocence consider all the evidence in the record, not just the evidence supporting the prosecution's theory of the case. *Schlup v. Delo*, 513 U.S. at 327-328.

B. Deference to district court findings is required only where the findings are actually factual and when they are not clearly erroneous.

The same disregard for the evidence in the district court record infects Respondent's allegation that the majority's decision is properly deferential to the district court finding of fact. Of the five district court holdings which actually are factual findings entitled to deference, the record shows three to be utterly unsupported by the evidence, and therefore clearly erroneous, and the remaining two are largely irrelevant to the *Schlup* inquiry in this case

Respondent, like the majority below, contends that the district court found that Mr. Muncey's two friends, Kathy Parker and Penny Lemer, who testified that he had confessed to them that he had murdered Ms. Wade were incredible. In fact, what the district court actually held was that it was, "not

impressed with individuals who wait over ten years to come forward with their evidence." Memorandum Opinion at 45 (Apx. 625). The distinction is critical. Kathy Parker's testimony expressly states that she did not wait "over ten years" to come forward with the evidence of Mr. Muncey's confession, but instead went to both local law enforcement the day after hearing the confession. Hearing Transcript 2/1/99 Vol.1, pp. 38-39, 44-45 (Apx. 844-845, 848-849). The district court's "finding" on this point is therefore clearly erroneous. The district court wholly ignored this fact. Respondent, like the majority below, also points to the district court's finding that the testimony of Mr. Muncey's daughter that she could not recall the furniture in the home being disturbed when she awoke to find her mother missing contradicts these two disinterested witnesses' account of Mr. Muncey's confession. The record reveals that neither Kathy Parker, nor Penny Letner, testified that Mr. Muncey had confessed to killing his wife in the home. Again, the district court's finding is clearly erroneous.[1]

Respondent contends that the majority properly defers to the district court's finding that any blood missing from the sample tubes taken during Ms. Muncey's autopsy escaped after Mr. House's blue jeans had been tested by the FBI. Respondent like the majority below, cannot point to a single piece of evidence which supports this finding and indeed there is no such evidence. Un-rebutted and un-impeached photographic and testimonial evidence before the district court show that the container in which the sample tubes were packaged had been inexplicably opened before arriving at the FBI Crime Laboratory. The testimony of FBI Agent Paul Bigbee demonstrates that more blood was missing from the sample tubes than the FBI would have used in testing. Finally, un-rebutted and un-impeached photographic evidence clearly reflect that the blood which did leak from the tubes after testing failed to

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[1]Not only are the district court's purported grounds for rejecting Parker and Letner's testimony devoid of support in the record, their testimony about Mr. Muncey's confession is corroborated by other substantial evidence of Mr. Muncey's guilt including, the consistency between the acts described in his confession and the nature of the victim's injuries, Mr. Muncey's long history of attacks on the victim, Mr. Muncey's attack on the victim the very night of her murder and his untruthful denial of seeing her that evening, and his attempt to secure a concocted alibi for the night of her murder.

account for three-fourths of a tube of missing blood. On yet another critical issue, the district court's finding is clearly erroneous.

Respondent also points to the district court's finding that Hubert Muncey Jr.'s daughter, Laura, was a credible witness when she testified at the federal evidentiary hearing. Respondent, however, relies upon only two aspects of Ms. Muncey's testimony, *i.e.*, that the home was not in disarray when she awoke to find her mother missing and that a person with a low voice had called to her mother from the road. As noted, the condition of the home was not relevant because no one testified that Mr. Muncey confessed to killing his wife in the home. As for the low voice calling from the road, there is no proof that this person was connected to the murder. Moreover, even if there were, Laura Muncey's testimony would exculpate Mr. House because she also stated that the person who had called to her mother had honked a car horn and the evidence at trial showed that Mr. House did not have an automobile on the evening of the murder.

Finally, Respondent places great importance on the district court's finding that Mr. House was not a credible witness when he testified about his whereabouts during the one and one-half hours he was gone from his girlfriend's trailer on the night if the murder. Contrary to Respondent's claim that this testimony was critical to Mr. House's case, whether he had a satisfactory alibi for that time period is of little significance. The record shows that Mr. House could not have physically accomplished all the acts he was alleged to have committed within that time frame. Moreover, unlike during a post-conviction federal habeas corpus hearing generally conducted according the Federal Rules of Civil Procedure, Mr. House could not have been compelled to testify before a jury at his own criminal trial[2].

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[2]Petitioner notes that, while immaterial, the district court's credibility finding is also clearly erroneous. Mr. House's testimony was identical to the statement he made to his girlfriend at a time he was not even a suspect in Ms. Muncey's murder and was corroborated by his muddy jeans (indicative of his flight through the woods), his separately discarded and non-blood stained tennis shoes, and the length of his absence from his girlfriend's trailer. The district court's observations of Mr. House's demeanor cannot justify its credibility finding, especially when that demeanor was at least partly the product of what was later discovered to be the symptoms of multiple sclerosis.

C. *Schlup* does not require a petitioner to disprove all evidence of guilt.

Much of what Respondent characterizes as factual findings are not factual findings at all, but the majority's improper application of *Schlup* to the facts developed in the district court. In each of these instances, Respondent, following the lead of the erroneous majority opinion, looks to whether equally credible evidence can be construed in such a way as to support conviction. This is not what *Schlup* requires. *Schlup v. Delo*, 513 U.S. at 330 ("Though the *Carrier* standard requires a substantial showing, it is by no means equivalent to the standard of *Jackson v. Virginia*, 443 U.S. 307(1979), standard that governs review of claims of insufficient evidence. The *Jackson* standard, which focuses on whether any rational juror could have convicted, looks to whether there is sufficient evidence which, if credited, could support the conviction.").

In the most prominent of these "findings" the majority rejects the DNA evidence showing that Mr. House had not raped the victim because a hypothetical reasonable juror could have concluded that Mr. House merely lured the victim out of her home and killed her for some other reason unknown to this very day. This wholly ignores the case as the prosecution presented it to the jury. The prosecution unequivocally maintained throughout trial that Mr. House, who had been convicted of a prior sex crime, murdered Mrs. Muncey after raping her. Schlup requires a court to consider the case presented at trial in light of the newly discovered evidence through the eyes of a reasonable juror. *See Schlup*, 513 U.S. at 327-328; *Wilkerson v. Cain*, 233 F.3d 886, 889, 892 (5th Cir. 2000); *Paradis v. Arave*, 130 F.3d 385, 396 (9th Cir. 1997). Similarly, the majority rejects the testimony of Assistant Chief Medical Examiner Cleland Blake that the stains on Mr. House's blue jeans came from the autopsy blood samples by speculating that a reasonable juror could have concluded that the similarities in enzymatic degradation could have been result of the similar environmental forces despite the radically different conditions to which the jeans and autopsy samples had been exposed coincidently coming together to degrade the very same enzymes to the very same degree, or that some of the myriad of unidentified stains observed by law

enforcement when they first seized Mr. House's jeans could have actually been blood and could have actually come from the victim. Finally, and perhaps most astoundingly, the majority rejected the evidence that the only time blood could have become mixed with mud on Mr. House's blue jeans, as both parties agree is the case, is after they were seized by law enforcement. Again, the majority speculates that a juror could have concluded that (although there was no mud where the victim was killed, no mud where her body was found, and the only evidence of blood and mud coming in proximity to one another was when House's wet muddy jeans were taken by law enforcement to the FBI Crime Laboratory together with the sample tubes) Mr. House had fallen in a mysterious mud hole in the middle of the road as he ran the approximately 2 miles from his girlfriend's trailer to the Muncey home. *House v. Bell*, 386 F.3d at 685.

Contrary to Respondent's and the majority's views, *Schlup* does not require Mr. House to eliminate all evidence of guilt. The proper question is whether it is more probable than not that any reasonable juror would vote for conviction. It is an easy question in this case and one which even the majority would have answered in the negative had it understood its duties under *Schlup*. The appropriate inquiry under *Schlup* is whether any reasonable juror would have concluded that Mr. House suddenly arose from his girlfriend's trailer, ran over two miles in twenty minutes over hill and dale, in the middle of a moonless night, taking time out to stop to fall in a mud hole and pick himself back up, lured Ms. Muncey from her home for no reason whatsoever (because irrefutable DNA testing had eliminated the prosecution's only alleged motive), killed her, hid her body, and ran back to his girlfriend's trailer an hour and a half after he left. The Sixth Circuit majority erroneously substituted its own judgment for that of a reasonable juror weighing the trial evidence against Mr. House against the evidence presented at the hearing below. The district court and the Sixth Circuit majority concluded that the following evidence would have convinced a reasonable juror to accept this scenario: (1) Mr. House lied about where he was for that hour and a half; (2) he did not accurately describe the origin of bruises which were too old to

have any relevance to the crime, (3) the victim's daughter heard a man with a low voice driving a car (despite un-rebutted evidence showing that Mr. House was on foot that night) call out to her mother; and (4) Mr. House was seen on the day after the murder walking toward the home of a man whom he had just told his girlfriend he was going to try to find. The district court and the Sixth Circuit majority dismissed Mr. House's evidence that the only biological evidence linking him to the crime - the bloody jeans - were sullied due to law enforcement mishandling and or misconduct. They concluded that it may have been a coincidence that the container carrying sample tubes of blood from the victim's autopsy was opened during transit to be tested by two men who just happened to also have Mr. House's blue jeans and that it might have just been a coincidence that the same enzymes in liquid blood samples and Mr. House's blue jeans degraded in exactly the same manner when exposed to radically different environments (despite testimony to the contrary by the Assistant Chief Medical Examiner for the State of Tennessee). Finally, the district court and the majority ignored Mr. House's compelling evidence implicating an alternative suspect - Hubert Muncey Jr. - in the victim's murder: he had attacked his wife in front of a witness only hours before her death, lied about that attack to law enforcement, tried to arrange an alibi, and confessed to murdering her in a manner consistent with not only his history of spousal abuse, but also the injuries to her body. Yet, the lower courts failed to evaluate this evidence from the perspective of a reasonable juror presented with it. Thus, both the district court and the Sixth Circuit majority erred in contravention of *Schlup*. *Schlup v. Delo*, 513 U.S. at 327.

The United States Court of Appeals quite simply misapprehended its obligation to look at all of the record evidence undermining the evidence used to convict Mr. House and that affirmatively pointed to his innocence. By the narrowest of margins, it issued an *en banc* decision which other courts will look to for guidance, if not corrected. At the same time, it left an innocent man on Tennessee's death row despite a trial fraught with constitutional error with no hope that a jury of twelve of his peers will ever render a judgment based upon all of the facts now in the record. Moreover, as the Petition outlines in

detail at pages 25 through 28 the federal courts of appeals are split and have applied Schlup inconsistently to cases with indistinguishable facts. *Jaramillo* v. *Stewart*, 340 F.3d 877, 883 (9th Cir. 2003); *Wilkerson* v. *Cain*, 233 F.3d at 891; *Lucas* v. *Johnson*, 132 F.3d 1069, 1077-1078 (5th Cir. 1998). The Court should grant certiorari to clarify the "substantial miscarriage of justice" exception to the procedural bar rule under *Schlup*, to reverse an erroneous *en banc* opinion of the United States Court of Appeals for the Sixth Circuit which now has the potential to mislead every court presented with evidence of actual innocence, and to provide justice to an innocent man who has spent twenty years on Tennessee's death row for a crime he did not commit.

II. The *Herrera* issue was considered by the circuit court and is properly reviewed on Certiorari.

Respondent offers only the jurisdictional grounds why the Court should not take this exceedingly rare opportunity to clarify the extent and requirement of substantive claims of actual innocence in a case where six judges of a United States Circuit Court of Appeals opine that the Petitioner has established his right to immediate release from state custody. Respondent argues that, because the *Herrera* issue was not included in the certificate of appealability issued by the panel, the circuit court, and now this Court, lacks jurisdiction to consider this important question. The circuit court may *sua sponte* consider issues which were not included in the order granting the certificate of appealability. *Vilot* v. *Varner*, 373 F.3d 327, 337, at fn 13 (3rd Cir. 2004); *U.S.* v. *Morgan*, 244 F.3d 674, 674-675 (8th Cir. 2001). In this case, the circuit court did just that when it issued its opinion in *House* v. *Bell*, 311 F.3d 767 (6th Cir. 2002), *cert. denied* 539 U.S. 937 (2003). In fact, the circuit court's consideration of the *Herrera* issue was one of the subjects of Respondent's petition seeking certiorari review of that decision. There is no procedural or jurisdictional obstacle to the Court's consideration.

It has been well over a decade since *Herrera* was decided. The uncertainty of that decision has left the lower federal courts confused as to the standard for resolving substantive claims of actual

innocence or even whether such claims are cognizable in federal habeas corpus. Here, in this exceedingly rare case where the evidence of actual innocence is truly overwhelming and where the Tennessee Supreme Court, when specifically asked by the circuit court to identify the state court procedures available to Mr. House, has already refused to indicate whether it will correct the grievous errors they have committed over the past twenty years, this Court should not hesitate to state clearly whether persons who have completely eviscerated the State's case for guilt, and presented affirmative evidence of innocence may obtain federal habeas corpus relief.

As Justices O'Connor and Kennedy observed in *Herrera*:

> Regardless of the verbal formula employed--"contrary to contemporary standards of decency," *post*, at 876 (dissenting opinion) (relying on *Ford v. Wainwright*, 477 U.S. 399, 406 (1986)), "shocking to the conscience," *post*, at 876 (relying on *Rochin v. California*, 342 U.S. 165, 172 (1952)), or offensive to a " 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' " *ante*, at 864 (opinion of the Court) (quoting *Medina v. California*, 505 U.S. 437, 445-446 (1992), in turn quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977))--the execution of a legally and factually innocent person would be a constitutionally intolerable event.

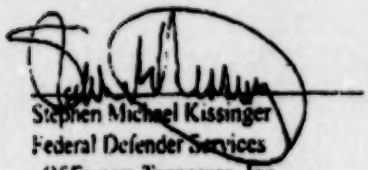
Herrera v. Collins, 506 U.S. 390, 419 (1993).

It is time to give effect and direction to the federal courts' power to prevent this constitutionally intolerable event.

CONCLUSION

Respondent's attempt to portray the majority's decision as nothing more than properly deferential to the factual findings of earlier courts is unavailing. Such deference is unwarranted except as to factual determinations which are not clearly erroneous. Furthermore, even with all due deference, the circuit court would have reached an opposite conclusion had it abided by the Court's holdings in *Schlup* and *Herrera*. Certiorari should be granted as to both questions.

Respectfully submitted.



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No. 04-8990

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Petitioner,

v.

RICKY BELL,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

CERTIFICATE OF SERVICE

I, Stephen Michael Kissinger, do swear or declare that on the 17th day of May, 2005, as required by Supreme Court Rule 29, I have served the enclosed REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Jennifer Smith, Office of Attorney General and Reporter, P. O. Box 20207, Nashville, TN 37202, telephone: (615) 741-4349.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 17, 2005.

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May 17, 2005

VIA FED EX PRIORITY OVERNIGHT

Clerk
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Re: Bell v. House, 04-8990

Dear Sir:

Enclosed please find the original and eleven copies of Mr. House's Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari and the original Certificate of Service.

Please return a "filed" stamped copy of the brief in the enclosed self-addressed and postage paid envelope.

Thank you for your cooperation.

Yours very truly,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

Stephen M. Kissinger

Stephen M. Kissinger
Assistant Federal Community Defender

SMK:sas
enclosures
cc: Jennifer Smith, Esq. (w/ enclosures)

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No. 04-8990

IN THE

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PAUL GREGORY HOUSE,
Petitioner,

v.

RICKY BELL, Warden,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE INNOCENCE PROJECT, INC., AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

The Innocence Project, Inc. ("the Project"), is a nonprofit legal clinic and criminal justice resource center. Founded by Prof. Barry Scheck and Peter J. Neufeld at the Benjamin N. Cardozo School of Law in 1992, the Project provides *pro bono* legal services to indigent prisoners for whom post-conviction DNA testing can provide conclusive proof of innocence. The Project pioneered the litigation model that has to date exonerated over 155 innocent persons by post-conviction DNA testing and served as counsel in the majority of these cases. Currently, we represent over 100 clients seeking post-conviction DNA testing, or relief from their convictions based on DNA test results, in dozens of states. As perhaps the nation's leading authority on DNA evidence and wrongful convictions, the Project's founders (both of whom are members of New York State's Commission on Forensic Science, charged with regulating all state and local crime laboratories) and its staff are regularly consulted on such issues by officials at the state, local, and federal level. This work has given *amicus* a particularly strong interest in ensuring that jury verdicts are premised upon valid and accurate forensic science – an interest that is directly implicated by this Petitioner's constitutional claims in a number of critical respects.

SUMMARY OF ARGUMENT

A decade ago, when this Court last considered the constitutional safeguards available to *habeas* petitioners with persuasive claims of actual innocence, it noted that such claims were "extremely rare." *Schlup v. Delo,* 513 U.S. 298,

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[*] *Amicus* certifies that this brief was written by undersigned counsel, and that no counsel for a party authored any portion of this brief or made any monetary contribution to its preparation or submission. Petitioner and Respondent have both consented in writing to the filing of this brief.

321 (1995). Without question, the criminal justice landscape has changed dramatically in the intervening decade. DNA technology – aptly described by former Attorney General John Ashcroft as "nothing less than the truth machine of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent"[1] – has since freed dozens of citizens from our nation's prisons and death rows, scientifically proving their innocence beyond any doubt. And while it remains true in the years since *Schlup* (thanks largely to state officials' acceptance of the probative value of DNA evidence) that federal habeas proceedings are not the primary forum in which such exonerations occur, these cases have nonetheless provided irrefutable proof that wrongful convictions are far less "rare" than anyone – including advocates for the innocent – ever imagined.

Yet the DNA "revolution" has done more than reveal that our nation has, with troubling frequency, sent innocent individuals to prison and death row. It has also exposed grievous flaws and shortcomings of various "old" methods of forensic science, ones that directly caused many of these wrongful convictions.[2] This fact – and the lower courts' need for direction as to how such new scientific evidence should be weighed in the *Schlup* analysis – makes Petitioner's case a critical one for this Court's review.

Specifically, DNA has revealed a finite but troubling class of convictions tainted by what is best described as "false facts": forensic evidence that likely carried great weight with the original jury, but which is now known, to a scientific certainty, to have been erroneous. Most commonly – as in Petitioner's case – such "false facts" are revealed by DNA tests proving that the defendant was not, in fact, the

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[1] "U.S. Targets DNA Backlog," CHICAGO TRIBUNE., Aug. 2, 2001.

[2] For example, 21 of the first 130 post-conviction DNA exonerations (16.15%) involved erroneous microscopic hair "matches" at the original trials. *See* Barry Scheck, Peter Neufeld, and Jim Dwyer., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 365 (New American Library ed., Dec. 2003).

source of critical biological evidence recovered from the crime scene, despite trial testimony to the contrary. In the instant case, the jury was told by an expert witness for the prosecution that the defendant was "definitely" a potential donor of semen on the victim's clothing, because he shared the perpetrator's distinct blood type and "secretor status"– yet DNA has now definitively excluded him as the source. Because these "false fact" discoveries involve unassailable science that would be, with good reason, enormously persuasive to a jury on retrial, they cast the *Schlup* inquiry (into whether "reasonable jurors" would likely find a reasonable doubt about guilt) in an entirely new light. Indeed, because of the public's widespread acceptance of DNA evidence, and its inherent objectivity and precision, the very considerations that usually counsel against permitting habeas petitioners to raise post-conviction challenges to their convictions – such as finality, and the need for public confidence in the outcomes of criminal cases – strongly work in favor of relief in this context.

The *en banc* majority in *House* failed to perceive this critical distinction, and its legal significance under this Court's precedents. In denying relief, it crafted a new rule which – if allowed to stand – could jeopardize the legitimate claims of a significant number of innocent persons in prison and on death row. That error requires this Court's correction – particularly because, in this case, some of the scientific "facts" presented to the jury were not just false, but fraudulent (*see* Point III, *infra*). And fortunately, because most State officials grasp the probative value of DNA evidence (and grant relief accordingly), this Court can do so without unduly burdening the federal habeas courts.

REASONS FOR GRANTING THE PETITION

I. A Newly Emerging Class of Post-Conviction Cases – in Which DNA Objectively Proves the Falsity of Critical "Facts" Relied Upon By the Jury at Trial

– Merit Heightened Significance in the *Schlup v. Delo* Analysis, and the *En Banc* Majority Failed to Recognize this Distinction

As persuasively demonstrated in Petitioner's *certiorari* petition, the Circuits are markedly divided on whether a convicted person can pass through the *Schlup* "gateway" if he does not negate each and every item of evidence offered against him at the original trial, no matter how persuasive his new evidence of actual innocence. When courts impose such a burden, they create a substantial risk that an innocent person may be executed, and that error – combined with the impressive evidentiary showing of actual innocence by this particular Petitioner – is reason enough to grant the Writ.

But this case crystallizes another recurring issue that has divided courts facing *Schlup* claims: Is there something about the nature of new scientific evidence of innocence – which definitively disproves material facts offered by the State at trial – that is of distinct importance in the *Schlup* inquiry? Put another way, should objective, scientific proof that a conviction was obtained by reliance on "false facts" be entitled to heightened significance over non-scientific evidence (*i.e.*, recantations by lay witnesses) in deciding whether "it is more likely than not that no reasonable juror would have convicted" had the truth been known?

The answer is a resounding "yes." The reasons go to the heart of *Schlup*'s equitable doctrine, as well as the administration-of-justice concerns shared by both the majority and dissenters in that landmark case. Since DNA testing is increasingly becoming the basis for meritorious claims of actual innocence – to an extent scarcely imagined when *Schlup* itself was decided – the time has come for this Court to squarely address its significance.

A. Public Confidence in the Outcome

Schlup's "gateway" is rooted in the equitable nature of

the habeas writ. *See id.* at 319. In providing a limited forum for a habeas petitioner with strong evidence of actual innocence to adjudicate otherwise-untimely claims of constitutional error, the *Schlup* Court balanced the constitutional imperative against execution of the innocent (the "fundamental miscarriage of justice exception") against considerations of finality, comity, and the orderly administration of justice. *See id.* at 324-25. Two years earlier, those same concerns led to the denial of relief in *Herrera v. Collins*, 506 U.S. 390, 404-05 (1993), in which the Court rejected the merits of the petitioner's "freestanding" actual innocence claim, while assuming that "a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional" and warrant habeas relief. *Id.* at 417.[3]

What tipped the equitable scales in *Schlup* – and renders it consistent with *Herrera* – was the principle that constitutional error at trial, coupled with a strong showing of innocence, so undermined "confidence in the outcome" as to merit less deference on habeas review. *Id.* at 315, 317. That principle also guided the Court in its selection of the standard to govern "gateway" claims. *Id.* at 325 ("a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks [it] should have" in the verdict) (internal citation omitted). To that end, the *Schlup* test imposes "less of a burden" on petitioners than would be required for a *Herrera* claim of innocence arising from an "error-free" trial. *Id.* at 315-16.

Scientifically proven "false facts" should be governed by the same principle. For while the error here is evidentiary, rather than "legal," the potentially devastating impact on public confidence in the system if the error goes uncorrected

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[3] Six Justices in *Herrera* went further, holding that truly persuasive "freestanding" innocence claims would clearly be cognizable. *See id.*, 506 U.S. at 870 (O'Connor and Kennedy, J.J.); *id.* at 430 (White, J.); *id.* at 430-31 (Blackmun, Stevens, and Souter, J.J., dissenting).

is arguably greater – particularly when the same new evidence that exposes the falsity supports a viable claim of innocence. Jurors are known to give less weight than lawyers to perceived legal "technicalities," but are more troubled when false scientific evidence may have tainted a conviction.[4] It is thus hard to imagine that the public would not find scientific "false fact" cases to fall within that "narrow class . . . implicating a fundamental miscarriage of justice." *Schlup*, 513 U.S. at 315 (internal citation omitted).

Further support for the proposition that such claims deserve special recognition under *Schlup* can be found in this Court's precedents concerning the use of fabricated evidence in criminal trials. This Court has long held that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois,* 360 U.S. 264, 269 (1959)(citing *Mooney v. Holohan*, 294 U.S. 103 (1935). Proof of fabrication requires that the conviction be set aside unless the error was truly harmless, *i.e.*, if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs,* 427 U.S. 97, 103 (1976). That is an even more exacting standard than applies when State officials deliberately withhold exculpatory information from the defense. *See, e.g., United States v. Bagley*, 473 U.S. 677, 682 (1985) (reversal warranted where there exists a "reasonable probability" that the jury's verdict "would have been different"). Thus, while both claims involve intentional

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[4] *See, e.g.*, "Juror says scientist influenced Moon case rape verdict," EL PASO TIMES, Dec. 23, 2004 (quoting juror in 1987 rape trial of Brandon Moon, after his exoneration by DNA evidence, that serology evidence at trial was "the majority" of what led jury to convict, as it was "what placed [Moon] at the scene more than anything else."); "Convicted Killer Seeks DNA Evidence to Argue His Innocence," AUSTIN AMERICAN STATESMAN, Feb. 11, 2005 (in wake of new evidence that Medical Examiner's assessment in 1986 murder case was flawed and DNA could establish innocence, three jurors reported "that [the M.E.'s] estimation of time of death was a key factor in their decision to convict").

misconduct on the part of State actors, the difference in the two standards makes clear that there is something particularly offensive about allowing convictions predicated on false evidence to stand uncorrected – because the public cannot (and would not) tolerate it.

The impact of objective, scientifically proven "false facts" on public confidence in the outcome of a criminal trial was not before the Court in *Schlup* or *Herrera*, nor has the Court addressed it in the intervening decade. But given the extent to which remarkable advances in DNA technology have already transformed the justice system, and will continue to do so, Petitioner's claim is timely indeed.

B. Impact on Other "Inculpatory" Evidence

Objective, scientifically proven "false facts" invariably do more than invalidate "old" forensic testimony relied upon by the jury. They also transform how a jury would evaluate the entirety of the prosecution's case, including both forensic and non-forensic evidence. This is most clearly demonstrated in what is sometimes described as the "simplest" of DNA cases: a sexual assault by a single perpetrator, in which the victim was not otherwise sexually active (*i.e*, all parties agree that semen from the victim's body came from the rapist). In-court identification testimony by the victim at trial ("I'm positive he's the one who raped me") is well known to have an enormous impact on juries – and, in the pre-DNA era, it was often "confirmed" by serological analysis of the blood type of the rapist's semen. Yet over 75% of DNA exonerations to date have involved rape convictions that were overturned upon conclusive, DNA evidence of innocence, despite the victim's eyewitness testimony at the original trial. In such cases, DNA tests showing that the defendant could not possibly have been the source of the semen immediately cast the once-"certain" identification in an entirely new light. It does not "erase" the victim's original testimony, of course, but eviscerates its

persuasive force, by providing scientific proof that the victim was honestly, but tragically, mistaken.

For a prime example, one need look no further than a case which had earlier reached this Court's own docket: *Arizona v. Youngblood*, 481 U.S. 51 (1989). In *Youngblood*, this Court held that, absent proof of bad faith, the Due Process Clause was not violated by a State's failure to preserve potentially exculpatory evidence in its custody – in that case, semen-stained clothing from the sexual assault of a child. In denying relief, one member of this Court took pains to note that Mr. Youngblood was unlikely to have been prejudiced by the evidence destruction, given what appeared to be "overwhelming" evidence of his guilt at trial. *Id.* at 60 (Stevens, J., concurring in the judgment). That evidence included the fact that the child victim who identified Youngblood in lineup had spent a full one-and-a-half hours in the perpetrator's presence, in broad daylight. He had also described the rapist as a black man with a defective right eye – a telling link to Youngblood's own "bad eye." *See State v. Youngblood*, 790 P.2d 759, 761 (Ariz.App.1989). The fact that Youngblood's defect was in his left eye, not his right, was seen as but a minor discrepancy in an otherwise solid identification. But when a cotton swab was located and DNA tested a decade later, the results squarely proved Youngblood's innocence – and ultimately identified the real perpetrator, a pedophile who was, in fact, missing his right eye.[5] Viewed in light of the DNA evidence, then, the in-court identification that had seemed so powerful at the time of trial was shown to be utterly mistaken and erroneous.

The power of "false facts" to alter the evidentiary landscape holds equally true in more complex cases. *Amicus* has represented dozens of clients against whom evidence in the trial record appeared massive – until DNA test results proved otherwise, generating a complete paradigm shift. In

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[5] *See* Scheck et. al., ACTUAL INNOCENCE 334-35.

these cases, a single new key fact can radically change the lens through which all of the "overwhelming" trial evidence – and the culpability of the defendant – is viewed.

Kirk Bloodsworth, for example, was convicted and sent to Maryland's death row for the rape-murder of an eight-year-old girl in 1985. Five separate eyewitnesses testified that Bloodsworth was the man seen with the victim just prior to her death. Were that not enough, the jury also heard that (a) a shoeprint near the body was the same size as Bloodworth's own; and (b) while being interrogated, he had revealed knowledge of a "bloody rock" at the crime scene – a detail then known only to police. Indeed, prosecutors were so convinced of Bloodsworth's guilt that even after DNA tests excluded him as the source of semen on the girl's underwear in 1992, they only conceded they were bound to reverse his conviction, but did not concede his innocence. It was not until ten years later, when DNA yielded a databank "hit" on the real killer – a convicted pedophile – that they did so, and belatedly apologized to Bloodsworth. By then, the evidentiary house of cards had truly fallen apart – revealing that the eyewitnesses (including heavily-coached children) were all mistaken; the same-sized shoeprint near the body a mere coincidence; and Bloodworth's "knowledge" of the bloody rock a fabrication by the police.[6]

A similarly "overwhelming" evidentiary record marked the 1988 trials of ***Ron Williamson and Dennis Fritz*** in Oklahoma, before DNA testing conducted on semen and hair evidence from the rape/murder victim exonerated them in 1999. Jurors had convicted both men, sentencing Williamson to death, after hearing the account of a man named Glenn Gore that he saw Williamson at the victim's workplace just before her murder; the testimony of three fellow inmates that

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[6] Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial, Nat'l Instit. Just., U.S. Dept. Just., NCJ161258 (June 1996) at 36; "In Same Case, DNA Clears Convict and Finds Suspect," NEW YORK TIMES, Sept. 6, 2003

the men had made admissions to the murder; that the victim had told a friend that the men "made her nervous"; and statements Williamson made in custody about a vivid "dream" of the crime. The state's experts also claimed that a total of 17 hairs from the crime scene "matched" Fritz or Williamson, and that both men were possible contributors of sperm inside the victim. Yet the same DNA tests that later excluded the men from this forensic evidence also provided a DNA link to the true perpetrator – the state's informant, Glenn Gore – thus exposing him and the other "snitches" as liars, and the statements the defendants allegedly made about the crime to be innocuous or invented.[7]

Former death row inmate ***Ray Krone*** of Arizona was the victim of another junk science, dubbed "forensic odontology," in which a defendant's dental impressions are "matched" to the bite marks left on a victim. Called "the snaggletooth killer" when convicted of the murder of a waitress whose killer bit her breast, he was exonerated by DNA testing a decade later that excluded him from the bite mark's saliva stains (and which, as in the Bloodsworth case, was matched to the DNA of a convicted sex offender).[8]

With good reason, then, the "ripple effect" of new evidence of innocence was not lost on the *Schlup* court. *See id.* at 330 (noting that, "under the gateway standard we describe today, the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial.") Yet the *en banc* majority in *House* failed to grasp this principle. By holding that Petitioner must "do more" than merely "raise questions about the reliability of portions of the trial testimony or the manner in which physical evidence was handled or analyzed," *House v. Bell*, 386 F.3d 668, 685 (6th Cir. 2004)(emphasis supplied), the court improperly

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[7] *See* "DNA Tests Clear Two Men in Prison," DAILY OKLAHOMAN, April 16, 1999; Scheck et. al., ACTUAL INNOCENCE 163-202

[8] *See* "DNA Frees Arizona Inmate after 10 Years in Prison," ARIZONA REPUBLIC, April 9, 2002.

viewed the new evidence in isolation – and denied the Petitioner the powerful inferences to which he was entitled.

For this case is one in which DNA and other advanced forensic evidence does more than just "raise questions" about "portions" of the trial evidence. It directly proves the falsity of key "facts" presented to the convicting jury, and its impact reverberates throughout the trial record. Most critically, by definitively proving that Petitioner was not the source of the semen stains on the underwear and nightgown worn by the victim, the DNA test results eviscerate the entire motive for the crime and theory of guilt upon which the prosecution asked the jury to convict (*i.e.*, that he lured Mrs. Muncey to a secluded area for purposes of sexually assaulting her, then killed her when she "resisted" him).[9] Similarly, the State Medical Examiner's new analysis of the enzyme degradation on Petitioner's blood-stained blue jeans, coupled with the evidence of blood spillage from the autopsy test tubes, does far more than just show that this blood could not have come from the victim's veins at the time of her murder. For if Mrs. Muncey's blood was not on Petitioner's jeans the night she was killed, and Petitioner's semen was not on her clothing, the value of the stains as "corroboration" for the eyewitness who claimed to have seen him at the crime scene is eliminated. And with both of these forensic "facts" no longer part of the trial record, a reasonable jury would be far more likely to credit Petitioner's innocent explanation for how he incurred his minor injuries that night – not to mention the overwhelming new evidence inculpating the victim's husband (including Mr. Muncey's motive, attempts to fabricate an alibi, and credible confessions to two members of the community).

Simply put, it is impossible for a reviewing court to

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[9] Indeed, the State told the court at the commencement of sentencing that "the fact that there was semen on the outer garment, that is, the nightgown" was its basis for seeking death, as it would support a finding that Petitioner murdered the victim "in the process of either rape or attempted rape." *House*, 386 F.3d at 693.

correctly make "a probabilistic determination about what reasonable, properly instructed jurors would do" (*Schlup*, 513 U.S. at 329) if it does not consider the potentially far-reaching impact of the new evidence on the old. This case provides an ideal vehicle for this Court to so instruct the Circuits, and avoid future error in this small but critical class of cases. *See id.* at 324-25 ("The quintessential miscarriage of justice is the execution of a person who is entirely innocent.")(internal citations omitted).

C. On "Finality": Memories Fade, but DNA Does Not

The *Schlup* court acknowledged a "threat to finality" inherent in any rule that facilitates habeas relief. *Id.* at 326. And among the chief stumbling blocks before the petitioner in *Herrera* was the Court's view that post-conviction factfinding was, by its very nature, less accurate than the original trial. *See* 506 U.S. at 403 ("[T]he passage of time only diminishes the reliability of criminal adjudications").

However true this maxim may have been in 1993, it is hardly so in the DNA era. Indeed, it is precisely because DNA test results are more objective, discriminating, and accurate than lay evidence – even decades after the crime – that access to post-conviction DNA testing has expressly overridden the ordinary rules of "finality" at both the state and federal level. As noted by D.O.J.'s National Commission on the Future of DNA Evidence:

> The results of DNA testing do not become weaker over time in the manner of testimonial proof. To the contrary, the probative value of DNA testing has been steadily increasing as technological advances and growing databases amplify the ability to identify perpetrators and eliminate suspects. . . . The strong presumption that verdicts are correct, one of the underpinnings of restrictions on post-conviction relief, has been weakened by the growing number of convictions that have been

vacated by exclusionary DNA test results.

POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS, Nat'l Instit. Just., U.S. Dept. Just., NCJ 177626 (Sept. 1999).

Scientific proof exposing "false facts" in a trial record is thus analytically distinct from virtually all other forms of post-conviction claims. In such cases, a court need not choose between fact-finding accuracy and due process, as both interests may be served by passage through *Schlup*'s gateway. The erasure of that dichotomy in this distinct class of cases should, in turn, send a clear message to lower courts that such evidence is entitled to substantial weight in determining what the verdict of "reasonable jurors," fully armed with this irrefutable science, would be.

That a retrial in Petitioner's case would now provide jurors with more objective and reliable forensic evidence cannot seriously be disputed. The principal reason, of course, is the newly proven "false fact" from the 1986 trial regarding the semen stains that would no longer taint those deliberations. The original jury was told by an FBI analyst that Petitioner (but not the victim's husband) was "definitely" among the small minority of men who shared both the blood type and secretor status of the semen donor, and thus could well have been its source. But as the *House* majority conceded, DNA has now proven – to an absolute scientific certainty – that neither stain came from Petitioner, and that both stains in fact came from the victim's husband, whom Petitioner has long contended was the real killer. *See House*, 386 F.3d at 687. Similarly, the majority's concession that Petitioner "succeeded in showing . . . that, at some point, the blood evidence appears to have been mishandled, resulting in spillage," *id.*, vastly understates the power of the new evidence, as well as the impact the original (false) blood evidence surely had on the jury's deliberations.

The uniquely probative and "timeless" nature of such

proof makes it imperative that this Court correct the *House* majority's failure to give it due significance under *Schlup*. For in future cases, no matter how powerful the DNA or other forensic proof, there will invariably be some "old evidence" left standing from the trial (whether the specious claim of a jailhouse snitch, or the honest but mistaken recollection of a purported eyewitness). Yet the *House* approach, if unchecked, could well erect an insurmountable bar to relief in future meritorious cases, whenever a prosecutor unreasonably chooses to contest a defendant's claim of innocence – no matter how weak the evidentiary "straws" that remain within the State's grasp may be.

II. This Court Must Ensure a Meaningful Federal Safeguard Against Wrongful Imprisonment and Execution for the Small but Critical Minority of Innocent Persons With Exculpatory DNA or Equally Compelling Post-Conviction Evidence, but to Whom Prosecutors and State Courts Unreasonably Deny Relief

Despite the revolutionary impact of DNA technology on the justice system in recent years, the pages of the Federal Reporter are not replete with exoneration case law. The reason is that this technology has so quickly gained acceptance among State officials – who recognize its power both to identify the guilty and exonerate the innocent – that most claims for post-conviction relief based on DNA evidence never reach the federal *habeas* courts, because relief is granted at the state level. Indeed, in the overwhelming majority of such cases handled by *amicus* and our colleagues to date, the defendants' exonerations have transpired on the full consent of the prosecution. There are also a small minority of cases in which the underlying conviction is vacated on consent, but the prosecution reserves the right to conduct a retrial – as, of course, the

State would be free to do here.[10] But *amicus* knows of no case to date with a result like *House*, in which both prosecutors and courts have failed to grant so much as a new trial despite the presence of (a) DNA and other new forensic evidence that proves the falsity of key "facts" heard by the jury at trial, and (b) a broad array of testimonial proof regarding an alternate suspect's motive, fabricated alibi, and contemporaneous confessions.

It becomes even clearer that the *House* majority stands as an "outlier" among its peers when the case is compared to analogous appellate rulings in both state and federal courts. State courts, for example, have properly granted new trials based on other newly discovered forensic evidence – even where the science at issue is far less advanced and persuasive to juries than DNA. *See, e.g., Alabama v. Banks*, 845 So.2d 9 (Ala.2002) (reversing conviction for murder of wife's newborn baby, based on new evidence that a prior tubal ligation likely precluded the alleged pregnancy, contradicting medical evidence at trial); *State v. Caldwell*, 322 N.W.2d 574 (Minn. 1982) (vacating murder conviction based on re-analysis of enhanced crime scene fingerprint, alleged at trial to have been defendant's, which upon closer review excludes him); *People v. Jackson*, 283 N.W.2d 648 (Mich. App. 1979) (new evidence that semen on victim's underwear is from non-secretor, while defendant was a secretor, would "render a different result probable on retrial"); *see also State v. Pope*, 80 P.2d 1232 (Mont. 2003) (in two-perpetrator, two-victim rape case, DNA excluding Pope, but including co-defendant,

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[10] For recent examples, *see, e.g., Brewer v. State*, 819 So.2d 1169 (Miss. 2002) (remanding for evidentiary hearing on new trial for death row inmate Kennedy Brewer, convicted of strangulation of child, after DNA excluded him from semen on girl's body) *and* "DNA Wins Inmate New Trial," The Clarion-Ledger, Sept. 6, 2002 (reporting prosecutor's subsequent consent to vacate Brewer's conviction, remarking, "If you follow the law on newly discovered evidence, [the DNA] would be possibly something that would change the jury's verdict"); "DA Says Inmate Should be Freed," Houston Chronicle, Oct. 1, 2004 (consenting to vacate rape conviction of George Rodriguez, who served 18 years in prison, after DNA excluded him from pubic hairs and invalidated serologist's trial testimony).

warranted vacatur); *People v. Waters*, 328 Ill.App.3d 117 (2002) (same, in three-perpetrator rape case, where defendant was alleged to have urinated on victim, yet DNA excluded him as source of urine).

Similarly, in those rare cases when convicted persons with new, exculpatory DNA test results have been required to pass through *Schlup*'s gateway to obtain relief, the district courts have largely concurred. *See, e.g., Watkins v. Miller*, 92 F.Supp.2d 824 (D.Ind. 2000) (granting writ to defendant convicted of rape/murder, as DNA excluded him from semen in victim's body; although state contended that reasonable jury could still convict based on defendant's confession to jailhouse informant, under theory that he committed murder with another man, court noted that DNA "changes the picture completely" and "conclusively disproves the only theory the state presented at trial"); *Nickerson v. Roe*, 260 F.Supp.2d 875 (D.Cal. 2003) (DNA from robbery-murder crime scene blood excluded defendant and inculpated co-defendant; while two eyewitnesses identified defendant, co-defendants swore he did not participate in crime).

But make no mistake: the fact that the State's refusal to grant Mr. House a new trial is patently unreasonable, and the *en banc* court's reasoning outside the norm, does not mean that the opinion will not have devastating and far-reaching implications if allowed to stand. Indeed, a number of *amicus*' clients wrongfully convicted of capital murder would not be free men today had the Sixth Circuit's tortured reading of *Schlup* governed their cases. Moreover, as has recently been noted, "pockets of resistance" are emerging among a small minority of prosecutors' offices, as they begin to steadfastly resist requests for DNA testing (even where it can unquestionably establish innocence or confirm guilt), or try to erect new procedural barriers to hearings on the significance of exculpatory DNA results.[11] While such

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[11] *See* "Prosecutors Fight DNA Use for Exoneration," THE NEW YORK TIMES,

efforts have been widely deplored by commentators and other law enforcement officials,[12] the *Schlup* gateway remains a crucial safeguard for that small – but undeniably critical – minority of innocent persons for whom state court processes fail to provide relief. This may be particularly so given that *Schlup*-eligible cases involve claims of constitutional error at trial, thus providing an incentive for some state actors to block the "gateway," *i.e.*, to prevent claims of egregious misconduct from being adjudicated on their merits (not to mention the risk of subsequent civil actions if serious constitutional violations are established).

The legal issues posed by this finite class of "false fact" cases are undeniably timely ones for review. By clarifying the application of a vital legal rule in a doctrinally distinct evidentiary context – one that was barely on the horizon when *Schlup* was originally decided – this Court can reaffirm our Constitution's venerable tradition of protecting the innocent, without fear of opening the floodgates to large numbers of such claims. And it is hard to imagine a class of *habeas* petitioners more deserving of this crucial safeguard.

III. Evidence of Fraud and Fabrication of Evidence by the State's Serology Expert at Trial, Recently Discovered by *Amicus*, Gives Additional Weight to Petitioner's Constitutional Claims – and New Urgency to His Petition for Certiorari

Most "false fact" cases in the DNA context are the result

Aug. 23, 2003; Carl Hiaasen, "Still Behind Bars, Despite DNA Evidence," THE MIAMI HERALD, May 9, 2004 (quoting State's assertion, in appellate argument, that even if it knew that defendant was "absolutely innocent," he would be entitled to no relief).

[12] *See, e.g.*, William Sessions, "DNA Tests Can Free the Innocent. How Can We Ignore That?" Washington Post, Sept. 21, 2003; "State Fought to Keep Innocent Man in Prison," MIAMI HERALD, Aug. 15, 2004; "Innocence Lost" (editorial), ST. PETERSBURG TIMES, Aug. 22, 2004 ("When prosecutors are uninterested in evidence of a defendant's innocence, they have lost their professional way. They should not only lose their jobs but their license to practice law").

of advancements in forensic science, not a revelation of bad faith on the part of the original crime lab analyst. That is, the original "fact" presented to the jury was supported by laboratory work which, even if rudimentary, was valid at the time of trial – *i.e.*, testing which showed that the defendant's blood type matched the one detected in the crime scene evidence, and thus the jury was (appropriately) informed that he was a potential donor. The "falsity" is established when new, and infinitely more precise, DNA technology proves that he could not, in fact, have been the source – often radically transforming the evidentiary picture upon which the original jury ruled, and thus requiring a new trial, but not impugning the lab work of the original analyst.

This case, however, appears to be far worse. For when *amicus* reviewed the record to assess the significance of the new scientific evidence, we discovered that the FBI serologist who analyzed the stains on the victim's underwear and nightgown, and compared them to the defendant's own blood type, appears to have wholly misrepresented the results of the original tests to the jury on both items.

The State's expert testified, quite properly, that under the ABO blood group system, the 80% of the population who are "secretors" (that is, whose blood antigens are detectible in their other bodily fluids) secrete "H" antigens; persons who are Types "A," "B," or "AB" will, *in addition*, secrete the A and/or B antigens, respectively. The defendant, he found, was an "A secretor." Yet he also reported that the victim's stained underwear (which consisted of semen mixed with the victim's vaginal secretions) had yielded only "H" antigens. The combined test results, then, clearly posed a problem for the State, if it wished the jury to find that Mr. House was a potential donor, since there were no "A" antigens detected in that stain, thus excluding him as the source. Here is how the State resolved that problem at trial:

Q: Can you tell us whether or not the A substance

could have been there, prior to you doing the testing?

A: It could have, yes.

Q: Does the age of the stain make a difference as to whether you find both of these substances?

A: The age of the stain does to some extent make a difference. The environment in which the stain remained after it was deposited could also make a difference. The H blood group substance is the precursor to the B and A blood group substances, chemically, and it can also be degraded from the A or the B to the H.

Q: Which means that the H lasts longer, so to speak?

A: In certain cases, yes.

Q: So, A could deteriorate into H?

A: Yes.

(TT. 901) (emphasis supplied).

This is sheer nonsense. For while it is true that age and environment can cause bodily fluids to degrade to the point where no blood group antigens can be detected, the selective degradation of only certain antigens described above (a/k/a the conveniently "Vanishing A") is simply unheard of in the field of serology.[13] And it is certainly a rule that any remotely competent serologist employed by the FBI in 1986 would have known. If the FBI's typing of the stain was accurate, the jury should have been told 20 years ago that Paul House, as an "A" secretor, was excluded as the source of the stain. The only explanation for this "Vanishing A" theory is that it was fabricated to conform with the State's case against Paul House, *i.e.*, to fraudulently misrepresent the results to make him a potential donor of that semen stain.

And there is more. The FBI reportedly detected both

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[13] Indeed, if antigens could selectively "vanish," then serology would never have been a reliable method for drawing inculpatory or exculpatory inferences from the antigens' presence or absence in a piece of evidence.

"A" and "H" antigens on the semen-stained nightgown. From this, the analyst found that "the person who deposited that semen was blood type A." (T.899). This, too, is wrong. For the analyst ignored a fundamental rule of serology called "masking" (*i.e.*, that in a mixed male-female stain, the greater proportion of cells from the female donor could "mask," and make undetectable, the male's ABO antigens).[14] Here, because the victim herself was presumptively a Type A secretor, any serologist would have to assume masking occurred – meaning that donor need not be an "A secretor" like Paul House, but could have been any man on the planet.

We raise these troubling discoveries not to ask the Court to directly review (or summarily grant) the *Brady* and *Strickland* claims pled by Petitioner in the District Court. But they do provide powerful evidence that the *Schlup* gateway is essential here, to ensure these claims get a full and fair hearing in that forum before Petitioner is executed. And these new facts would likely entitle him to the far more generous standard of review afforded to Petitioners who prove deliberate fabrication of evidence by the State and its agents. *See, e.g., Augurs*, 427 U.S at 103. Surely, coupled with Petitioner's powerful claim of actual innocence – so strong that six Circuit Judges would have freed him from custody without delay, and a seventh would have granted the writ and ordered retrial – one cannot have the remotest "confidence in the outcome" of this deeply flawed trial.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the petition for certiorari should be granted.

Respectfully submitted,

---

[14] See, e.g., U.S. Dep't of Justice, "Proceedings of Forensic Science Symposium on the Analysis of Sexual Assault Evidence," Lib. Cong. Cat. No. 84-601146 (July 8, 1983) (reporting standards promulgated at FBI-sponsored symposium, by scientists from 125 laboratories to establish parameters analysis of sexual assault evidence; participants noted that in mixed samples, when all markers can be attributed to victim, the analyst may not opine as to source of semen).

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In The
Supreme Court of the United States

PAUL GREGORY HOUSE,

Petitioner,

v.

RICKY BELL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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CAPITAL CASE

QUESTIONS PRESENTED

I. Did the majority below err in applying this Court's decision in *Schlup v. Delo* to hold that Petitioner's compelling new evidence, though presenting at the very least a colorable claim of actual innocence, was as a matter of law insufficient to excuse his failure to present that evidence before the state courts – merely because he had failed to negate each and every item of circumstantial evidence that had been offered against him at the original trial?

II. What constitutes a "truly persuasive showing of actual innocence" pursuant to *Herrera v. Collins* sufficiently to warrant freestanding habeas relief?

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JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 2004. No further rehearing was sought. Justice Stevens extended the time for filing a petition for writ of certiorari to and including March 5, 2005. The petition was filed on March 3, 2005. Certiorari was granted on June 28, 2005. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution, which respectively provide that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"; "nor [shall] cruel or unusual punishments [be] inflicted"; and "nor shall any State deprive any person of life, liberty, or property, without due process of law." This case also involves 28 U.S.C. § 2254d(1), which provides that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . ."

STATEMENT OF THE CASE

A Tennessee jury convicted Paul House of first-degree murder after the prosecution urged jurors to conclude from circumstantial evidence that he had abducted, attempted to rape, and murdered the victim. In federal habeas corpus proceedings below, House presented new evidence, including objective scientific evidence, which proved that the key evidence adduced by the prosecution at trial to link him to the crime was either false or unreliable. He also presented credible new evidence demonstrating that the victim's husband was probably the killer. The significance of this new evidence sharply divided the lower federal courts on two questions: (1) whether the new evidence was sufficient under *Schlup v. Delo*, 513 U.S. 298 (1995), to permit adjudication of his defaulted ineffective-assistance-of-counsel claim, and (2) whether it established his actual innocence under *Herrera v. Collins*, 506 U.S. 390 (1993). The district court and a bare majority of the *en banc* court of appeals dismissed House's petition even though all the judges agreed that his new evidence presented a colorable showing of innocence. Seven dissenters in the court of appeals determined that he had clearly met the *Schlup* standard, and six of them found that he had shown his actual innocence of the crime. *House v. Bell*, 386 F.3d 668 (6th Cir. 2004) (*en banc*). The record shows the following:

A. State Trial Court Proceedings

1. The Crime

This case arises from Union County, Tennessee, a rural county north of Knoxville. In July 1985, Carolyn Muncey, the victim, resided on Ridgecrest Road with her husband Hubert Muncey, Jr., and their two minor

children.[1] It was well-known that Hubert Muncey, Jr., was an alcoholic, that the Munceys had marital difficulties, and that Hubert had been abusive toward Carolyn. J.A. 229; J.A. 234; J.A. 237. Paul House had recently moved to Union County to be near his mother. When Hubert Muncey, Jr., reported to authorities that he had come home from a dance in the early morning hours of July 14, 1985, to find that his wife was not home with the children, local law enforcement and the community came together to search for her. Almost immediately after Carolyn Muncey's badly beaten body was found the next afternoon at the base of an embankment near a roadway where Paul House had been seen earlier, House became the sole suspect in her murder. His motive, it was supposed, was rape.

2. Trial Proceedings

House was tried in Union County in February 1986, after a change of venue motion was denied. The evidence showed that Ms. Muncey left her home sometime prior to 11:00 p.m. on July 13 and was not seen again until her fully clothed body was found the next day. Both the coroner and the state pathologist determined she died between 9:00 and 11:00 on July 13. J.A. 76. Lacking either a confession or an eyewitness, the prosecutors sought to show, entirely by circumstantial evidence, that House tricked Carolyn Muncey out of her home and killed her when she resisted his sexual advances. The defense asserted that House was innocent, that he had no motive to harm Ms. Muncey, and that the evidence failed to show his guilt beyond a reasonable doubt.

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[1] Hubert Muncey, Jr., was widely known in the community as "Little Hube" and his family called him "Bubba" and "Bubbie."

3. The Circumstantial Case for House's Conviction

The evidence presented by both parties focused upon five issues: Did House have the opportunity to commit the crime when he walked away from his girlfriend's trailer late on the evening of July 13? Why was House, on the following day, near the location where the body was recovered? Why did House, when questioned, mislead law enforcement about his whereabouts and clothing on the night of the 13th? Did analysis of blood, semen, hair, and fiber evidence reliably link House to the crime? And, was Hubert Muncey, Jr., responsible for his wife's death?

a. The equivocal evidence concerning House's opportunity to commit the crime

The Munceys' ten year-old daughter, Laura, testified that sometime after she went to bed on July 13, she was awoken by a honking car horn. She heard a man with a low voice calling out to her mother. The voice asked if she knew where her husband could be found. Laura heard her mother respond that he was out digging a grave. J.A. 18, 21-22. Laura also told the jury that, "they said that daddy had a wreck down the road, and [her mother] started crying – next to the creek." J.A. 18.

Pam Luttrell, who lived across the road from the Munceys, testified that Carolyn Muncey had told her earlier that evening that her husband was digging a grave and had promised to take her fishing the following day. J.A. 12. She testified that later, in the early morning hours of July 14, Mr. Muncey appeared with his kids and said Carolyn was missing. He left Laura and Matthew, 8, with Ms. Luttrell. That morning, Laura told Ms. Luttrell that someone had come looking for "Bubbie" (a family nickname for Mr. Muncey). Laura also said that she heard her mother crying and going down the steps, but that Laura

was not sure whether this was at the same time or some time later. J.A. 14. Ms. Luttrell testified that Matthew had interrupted Laura while she was talking, saying, "sister – they said daddy had a wreck, they said daddy had a wreck." J.A. 13.

Laura Muncey testified that she did not immediately start looking for her mother. Instead, she waited for a while to see if her mother would return. Only then did she get up, wake Matthew, and go out to see if they could locate their mother. J.A. 18-19, 23-28. When they did go out, they first went to the Luttrells. When the Luttrells did not answer, they went to the Clintons. J.A. 27-30. According to Michael Clinton, their knock on the door came at 10:55 p.m. J.A. 83-85.

On the day of Carolyn Muncey's murder, Mr. House was living with his girlfriend Donna Turner. Her trailer was 1.9 miles from the Muncey home. J.A. 81. House did not have a car. Ms. Turner testified that late that evening, Mr. House announced that he was going for a walk. He left her trailer on foot no earlier than 10:45 p.m.[2] When he returned around midnight, he was out of breath, sweating, and disheveled. He also was missing his shoes and shirt (a blue tank top with yellow trim). Ms. Turner observed that when Mr. House returned, his finger was swollen. She had not noticed that injury earlier.[3] She testified that Mr. House attributed his condition to the fact that he had been accosted by a group of men in a pick-up and that he had fled through the woods to escape. J.A. 86-87, 88-91. In two statements he gave to police, which were read to the jury,

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[2] The prosecution introduced evidence that Ms. Turner at one time told police that Mr. House could have left between 10:30 p.m. and 10:45 p.m. J.A. 82-83.

[3] These injuries were photographed by law enforcement when they first interviewed Mr. House on July 14. J.A. 77-80.

Mr. House maintained that his injuries were incurred innocently from tearing down a shed a few days earlier and from playing with Ms. Turner's cat. J.A. 74-75.

Donna Turner testified that she was certain House did not use her car while he was on his walk. J.A. 87-88. The evidence showed that investigators seized her car, examined it for four days (even keeping a towel she had placed on the front seat the day before Ms. Muncey disappeared for further examination) and discovered no evidence whatsoever linking the car to the crime. J.A. 44-45, 92-93. Mr. House's mother testified that her car, which Mr. House had used on occasion, was loaded with boxes and was not used by anyone on that night. J.A. 95-98.[4]

During closing, the prosecutor urged jurors to conclude, notwithstanding a complete lack of evidence, that Mr. House had used one of the vehicles on the night of the murder. J.A. 99-101. Alternatively, the prosecutor argued that if Mr. House had indeed left Donna Turner's trailer on foot at 10:30 p.m., he would have had plenty of time to perpetrate the crime. J.A. 105. The defense countered that Ms. Turner was certain that Mr. House left her trailer no earlier than 10:45 p.m. and that he did not use her car. J.A. 101-103. Even if he had left at 10:30 p.m., as the prosecution suggested, House still would have been unable to walk almost two miles over the hilly terrain and commit the crime within the time frame established by the evidence. J.A. 103-104.

b. House's presence on Ridgecrest Road the next day

The prosecution called two witnesses, Billy Ray Hensley and Jack Adkins, to establish its theory that House returned

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[4] House lived roughly one mile from his mother's house. J.A. 82.

to the crime scene the following day to retrieve his missing blue tank top. This evidence was also equivocal because Hensley was impeached on critical portions of his account and no shirt or dark rag was ever recovered.

Hensley testified that on the afternoon of July 14, he was driving toward the Muncey home looking for Mr. Muncey. He stated that while driving on Bear Hollow Road near its intersection with Ridgecrest Road, he saw Mr. House coming up an embankment wiping his hands on a dark rag. J.A. 31-33. Mr. Hensley said after he saw Mr. House, he turned left on Ridgecrest Road, did not see Mr. House as he drove up Ridgecrest Road, but did see a white Plymouth parked on the side of the road. After determining that Mr. Muncey was not home, Mr. Hensley headed back toward Bear Hollow Road. He then met Mr. House driving the white Plymouth. He testified that Mr. House flagged him down. House stated that he was looking for Mr. Muncey because he had heard about Carolyn's disappearance and that Mr. Muncey was drunk. J.A. 32-34.

On cross-examination, Hensley admitted that he did not actually see Mr. House coming up the embankment but only that he appeared "out of nowhere." J.A. 38-39. Hensley also conceded that he saw House for only a second or two. J.A. 40. Hensley acknowledged that he had earlier told officers that he first saw House on the roadway *not* from Bear Hollow Road, but after he had turned onto Ridgecrest Road and traveled several hundred feet up the road – well past where the body was later found. J.A. 35-38. He was not able to say the car was on the same side of the roadway as Ms. Muncey's body. J.A. 40-41.

Another witness, Billy Hankins, testified that he saw a man fitting House's description on the roadway that day. Hankins said he saw this man on the opposite side of the road from where Ms. Muncey's body was found but on the same side of the road as the Muncey home. The man was

walking toward the Muncey home. Jurors also heard a statement House made to law enforcement officers in which he said that he had parked the Plymouth on Ridgecrest Road. He explained that he then walked from his car to the Muncey home.

Hensley further stated that after speaking to Mr. House he continued on his way. He found Muncey about a mile away at the home of Bill Silvey. Muncey was drunk. Thereafter, Hensley and Adkins returned to Ridgecrest Road and, near where Hensley said he saw House, Adkins found Carolyn Muncey's body. It was partly covered with brush, down off the road.

Soon thereafter, several law enforcement officials met Adkins at the scene. Other civilians soon appeared, including House and Muncey, who arrived together. Adkins told Sheriff Loy that House was the man Hensley claimed he had seen coming up the embankment to Ridgecrest Road near to where Adkins found the body.

The prosecutor argued during closing that Mr. Hensley had actually seen Mr. House coming up the embankment and that the black rag in his hands was actually the missing blue tank top which House had been wearing the night before. He asserted that Mr. Hensley located Ms. Muncey's body at the exact spot where he had seen Mr. House. Defense counsel reminded the jury of the sharp inconsistencies in Hensley's accounts and pointed out that of all the many photographs the prosecution had shown the jury, none showed the view from where Mr. Hensley claimed to have seen Mr. House.

c. House's custodial statements

The State presented evidence that House misled law enforcement officials.

During police questioning on July 14, hours after recovery of Carolyn Muncey's body, House willingly provided

a detailed account of his whereabouts on the previous night as well as earlier that day. He told officials that he had spent the entire Saturday evening with Ms. Turner and had not left her residence. He said the jeans he was wearing during questioning were the same pair he had worn the previous night. House also told police that injuries to his hands resulted from recent construction work and scratches to his arms from Ms. Turner's cats. He denied having been down the embankment where Jack Adkins discovered Carolyn Muncey's body. He told police he had been on the road only, and was searching for Mr. Muncey. He parked Donna Turner's car at a turnout because he had missed the Muncey driveway. He then walked back to the Muncey home. His full statement was read to the jury.

Other evidence showed that Mr. House, when questioned, was not wearing the same jeans he wore on Saturday evening. On July 15, Donna Turner told police that the jeans that House wore on Saturday evening were in the laundry hamper in her trailer. Law enforcement officers seized them and entrusted them to the care of William Breeding, a local law enforcement officer.

During closing, the prosecutor argued that Mr. House had lied to law enforcement officers about being at Ms. Turner's trailer the entire evening. He argued that Mr. Hensley's testimony proved that House had lied about not being down the embankment. He argued that House had also lied about the injuries observed by law enforcement: House gave Ms. Turner a different explanation about the injury to his finger than the one he gave the police. Defense counsel did not dispute that Mr. House had misled law enforcement about not leaving Ms. Turner's trailer and the clothes he was wearing. Counsel submitted that Mr. House was not trying to conceal his guilt. If he had, he surely would have washed his jeans in the thirty-six hours between the alleged crime and the time he was questioned. Counsel also argued that House's statements to Ms. Turner

about his whereabouts during his Saturday evening absence from her trailer was consistent with the length of his absence. In contrast, the prosecution's theory that he had walked to the Muncey house, committed the murder, and walked back during this period of time was impossible.

d. The forensic evidence

By far the prosecution's most damning evidence came from FBI special agents who gave largely unrebutted evidence that appeared to directly link House to Ms. Muncey's murder.

Agent Paul Bigbee, a serologist, testified that he received House's blue jeans and vials of Ms. Muncey's blood from state officials. He described the tubes of blood as badly degraded and rotted, J.A. 72, and the stains on the pants as minute. J.A. 71. He performed several tests upon House's blue jeans to determine whether there was blood, and if so, to identify its origin.[5] While he searched for sixteen genetic markers/enzymes, he was able to find only four because enzymes outside the body quickly become unstable and degrade. The combination of markers from these three tests led Bigbee to conclude that there were several small human blood stains on the pants, and that the blood did not come

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[5] He described the tests and their results as follows: The first, ABO grouping, is grouping according to the four blood types, A, B, AB, and O. The blood found on the jeans was type A, which was consistent with both Carolyn Muncey and House. The second test groups an enzyme found in blood called phosphoglucomutase (PGM), which is grouped broadly into type 1, 2, and 2-1, and is further sub-typed into ten different groups, designated as 1-, 1±, 2- or 2±, or any combination thereof. The PGM type in the blood stains on the jeans was a 1-,1±, consistent with Carolyn Muncey's blood, but not House's. The third test groups a protein called haptoglobin, of which three types are found in Caucasian blood, designated as 1, 2, and 2-1. The haptoglobin type found in the blood stains was consistent with the type found in Carolyn Muncey's blood and inconsistent with that of Paul House.

from House, but was consistent with Ms. Muncey's blood. Bigbee calculated that the probability was roughly less than 7% of the population would have the same combination of characteristics as the blood found on the jeans. He acknowledged that no serologist could state unequivocally that an individual was the source of a stain to the exclusion of all others. J.A. 48-52, 66-70.

Bigbee also testified that he analyzed semen stains found on the nightgown and underwear. From the material supplied to him, he determined that House has type A blood and is a secretor. Bigbee testified that a person who is a secretor would also secrete the H blood group substance. A person who has type A blood and is a secretor would secrete both the A and H blood group substance. Bigbee found that the stain on the nightgown contained both A and H blood group substances, but the stain on the underwear yielded only the H blood group substance. He explained that the environment in which the stain was deposited could have led to the A blood group substance deteriorating into the H blood group substance, since the H blood group substance is the chemical precursor to the A blood group substance and lasts longer. While he could not say how long they had been there, he testified that both stains were consistent with House's blood type and secretor status. Because prosecutors did not provide him with the necessary biological evidence to determine Hubert Muncey's secretor status, he could not give an opinion whether Muncey could have been the source of that material. J.A. 57-59, 72-74.

Agent Chester Blythe, a micro-analyst, testified that he examined hair found on Ms. Muncey's body and hand. None of the collected hair was similar to House's. J.A. 46. Blythe also analyzed fiber material recovered from Ms. Muncey's clothing and body. He found blue jean fiber consistent with House's pants on each article of Ms. Muncey's clothing provided to him – the robe, nightgown, bra and panties – as well as in her nail clippings. He conceded that blue jean fiber

is very common and not unique. He found no fiber from Ms. Muncey's clothing on House's jeans.

The defense presented no rebuttal expert testimony.

The prosecutor argued forcefully in closing that the forensic evidence presented at trial showed that House had left his semen on Ms. Muncey's clothing during his vicious assault, J.A. 106, and that she marked his pants with her blood as she bravely, unsuccessfully fought his advances. He told the jury:

> [d]efense counsel does not start out discussing the fact his client had blood on his jeans the night Carolyn Muncey was killed. He doesn't start with this man's jeans. He doesn't start with the blood that was on the jeans. He doesn't start with the fact that nothing that the defense has introduced in this case explains what blood is doing on his jeans, that is scientifically, completely different from his blood

J.A. 104.

e. Evidence that Hubert Muncey, Jr. was the killer

The defense called Ricky Green, Carolyn Muncey's brother. He told jurors that two weeks before his sister's death, she called him and was upset. She had just argued with her husband, and she was waiting for him to leave. She was afraid of him, and wanted to take her children and live with Green. It was unusual for Green to receive a call like this. Green also testified about having witnessed a drunken Hubert Muncey smack his sister on an earlier occasion.[6]

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[6] The prosecution did not call Hubert Muncey, Jr., as a witness, and Paul House did not testify in his own defense.

4. The Instructions and Verdict

During the court's instructions, the jury was charged, *inter alia*, on circumstantial evidence and reasonable doubt.[7] The jury returned a verdict of guilty of first degree murder.

5. The Sentencing Phase

The prosecution urged the jury to find three statutory aggravating circumstances: (1) the defendant was previously convicted of one or more felonies . . . "which involved the use or threat of violence to the person"; (2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind, and (3) the murder was committed while the defendant was engaged in committing or attempting to commit rape or kidnapping. J.A. 109. *See* TENN. CODE ANN. § 39-2-203(i)(2), (5), and (7). The prosecution called only one witness, House's parole officer, who testified that House had previously been convicted in Utah for aggravated sexual assault. J.A. 111. The defense called House's father and mother. They provided brief testimony about House's childhood and asked the jury not to impose the death penalty. J.A. 111-121. After arguments and deliberations, the jury found all three aggravating circumstances and imposed the death penalty.[8]

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[7] The circumstantial evidence instruction charged jurors that "when the evidence is made up entirely of circumstantial evidence, then before you could be justified in finding the defendant guilty, you must find that all of the essential facts are consistent with the hypothesis of guilt, as that [sic] to be compared with all the facts proved. The facts must exclude every other reasonable theory or hypothesis, but that of guilt, and the facts must establish such a certainty of guilt of the defendant as to convince the mind beyond a reasonable doubt that the defendant is the one who committed the offense." J.A. 108.

[8] On direct appeal, the Tennessee Supreme Court affirmed House's conviction and death sentence, and characterized the evidence against House as "circumstantial" but "quite strong." *State v. House*, 743 S.W.2d

(Continued on following page)

B. State Postconviction Proceedings

On September 25, 1988, House, *pro se*, filed a petition for postconviction relief in the state trial court. He alleged that trial counsel provided ineffective assistance of counsel, in part because he failed to adequately investigate and present a defense at the guilt phase of the trial. Counsel was appointed. Relief was denied on all claims. Through counsel, House appealed, but raised only one sentencing instruction claim. The Tennessee Court of Criminal Appeals affirmed the denial of relief. *House v. State*, 1989 WL 152742 (Tenn.Crim.App. 1989), and the Tennessee Supreme Court denied review. *Id.*

Thereafter, House filed a second state postconviction application, this time with new counsel, and again asserted his ineffective assistance of counsel claim. The State argued that this and other pleaded claims were barred because they either had been previously adjudicated or had been waived. The Tennessee Supreme Court ruled that House's ineffective assistance of counsel claim had been previously determined and could not again be brought. *House v. State*, 911 S.W.2d 705 (Tenn. 1995). This Court denied review. *House v. Tennessee*, 517 U.S. 1193 (1996).

C. Federal Habeas Corpus Proceedings in the District Court

In September 1996, House filed a habeas corpus petition in the United States District Court. He claimed that he was innocent of the underlying crime and pleaded his ineffective assistance of counsel claim, together with a claim that the prosecution had suppressed exculpatory, material evidence at trial. He requested a hearing. The

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141 (Tenn. 1987). Certiorari was denied. *House v. Tennessee*, 498 U.S. 912 (1990).

Warden responded that these claims were not properly before the court because they had not been properly raised in the state court. The district court granted the Warden's motion for summary judgment on most of the pleaded claims and set a hearing on "Mr. House's claims of actual innocence of the offense, actual innocence of the death penalty, and ineffective assistance of counsel. . . ." Cert. App. 88.

1. The New Evidence Supporting House's Innocence

At the hearing below, House presented both expert and lay testimony to establish two points. First, new scientific evidence demonstrated that the forensic evidence which had been crucial in establishing at trial the prosecution's theory that House killed Ms. Muncey during a sexual assault – the prosecution's only theory that gave House any motive to kill Ms. Muncey – was indisputably false or completely untrustworthy. Second, persuasive testimony from several long-time friends of Hubert Muncey, Jr., showed that Muncey was unhappy with his marriage, wanted to get rid of his wife, confessed to them that he had killed her, and asked them to provide him with an alibi.

The Warden submitted rebuttal evidence. The habeas record shows:

a. There is new evidence establishing beyond peradventure that much of the State's circumstantial case rested upon inaccurate and misleading evidence

i. DNA evidence proves that the source of the prosecution's semen evidence was Hubert Muncey, not Paul House

During the proceedings below, both House and the Warden subjected the clothing evidence to DNA testing.

Lisa Calandro, a forensic scientist at a private forensic laboratory, testified that analysis of DNA material removed from the semen stains on the nightgown and panties showed that House was *not* the source of the semen. J.A. 238-239. The Warden concurred in this finding. State forensic experts also confirmed that Hubert Muncey, Jr., the victim's husband, was the donor of the semen found on these articles of Ms. Muncey's clothing. This new evidence destroyed all factual support for the prosecution claim that House raped or attempted to rape Ms. Muncey. It left no intelligible motive for House's supposed commission of her murder.

ii. New analysis of blood on House's jeans strongly points to its transfer there during the investigation, not during the crime

Dr. Cleland Blake, the Assistant Chief Medical Examiner for the State of Tennessee, testified that the bloodstains on Mr. House's blue jeans came from blood contained in the sample tubes taken during Carolyn Muncey's autopsy, *not* from transmission during the crime. J.A. 250-251. He explained the basis for his finding as follows: He observed that when Agent Bigbee tested Ms. Muncey's autopsy samples in 1985, Bigbee detected measurable enzymatic activity for only a small number of sixteen factors. Again when Agent Bigbee tested the bloodstains on Mr. House's blue jeans, he was able to detect measurable activity for only the same small number. J.A. 252. Consistent with Agent Bigbee's trial testimony, Dr. Blake opined that certain factors/enzymes in human blood varied in stability, and noted that one, the glyoxylase enzyme, should have been present in the bloodstains on Mr. House's blue jeans. J.A. 253-255. Dr. Blake also agreed with Bigbee that many factors contributed to a finding of no measurable activity, including whether the blood sample was liquid or a dried stain, the environmental

factors to which the blood had been exposed, and the amount of bacterial activity. J.A. 243-244, 248, 250, 251. Finally, Dr. Blake considered evidence that blood appeared to have escaped the autopsy blood samples prior to their arrival at the FBI crime laboratory. J.A. 248-250.

Because the Carolyn Muncey autopsy sample was "rotted" liquid blood, removed from a body that had lain out in ninety-degree weather for the better part of a day, while the stains on House's blue jeans had been subjected to much different environmental factors, it could be expected that the enzyme factors on each would differ significantly. Because both showed measurable activity for virtually the same enzymes, Dr. Blake concluded that the source of the bloodstains on Mr. House's jeans was the highly degraded liquid blood samples taken during her autopsy. J.A. 250-252.

Agent Bigbee was called to rebut Dr. Blake's opinion, but agreed with Blake that liquid blood would degrade faster than dried blood. J.A. 283. He also agreed that the blood in Ms. Muncey's sample tubes had been badly degraded, *id.*, and that one of the missing enzymes, glyoxylase, would normally exhibit detectable activity a week after death. J.A. 282-283. He even agreed that it was "curious" that the bloodstains on the jeans and the autopsy samples showed such similarity in the enzymes that displayed similar identifiable activity. Agent Bigbee opined, however, that because there were many different factors that could cause a particular enzyme to not demonstrate identifiable activity, the bloodstains on Mr. House's jeans could have been exposed to a different set of factors than the liquid autopsy samples and still have yielded such similar results when tested.

iii. New evidence shows that blood escaped from the autopsy blood samples prior to, not after, FBI testing

The record evidence shows that four sample tubes of blood from Carolyn Muncey's autopsy were sent to the FBI. J.A. 311. Agent Bigbee used no more than one-quarter of a tube of blood for testing purposes. Agent Bigbee testified that the FBI did not spill any blood from the sample tubes while they were in the FBI's possession. J.A. 279. Howard Bragdon, an employee of the defense serological expert, photographed the autopsy samples when they were received from TBI Agent Scott in October, 1985, following FBI testing. That photograph showed that one sample tube was completely empty while another was only one-half full. J.A. 307. Bragdon, who personally received the samples from Agent Scott, confirmed that the blood was missing. J.A. 240. The photograph reveals that blood had leaked from the autopsy sample tube that remained one-half full during transport from the FBI to House's serological expert. It also shows that only a negligible amount of blood leaked from the empty autopsy sample tube. J.A. 307. There is no contradictory evidence. At least three-fourths of the blood in the empty autopsy sample was neither used by the FBI in testing nor spilled after FBI testing. It is undisputed that prior to FBI testing, the blood samples were in the exclusive control of the State of Tennessee.

Abundant evidence pinpoints when the missing blood was removed from the autopsy samples. Officer Breeding took Carolyn Muncey's unsealed autopsy blood samples directly from the pathologist. J.A. 8; J.A. 42-43. He also took possession of Mr. House's blue jeans when they were seized from Donna Turner's trailer. J.A. 8; J.A. 43. Breeding and Officer Jo Ed Munsey packaged the blue jeans and the autopsy samples and personally transported them by automobile to the FBI Crime Laboratory. J.A. 8-9. Breeding and

Munsey sealed the blood samples in a Styrofoam container. The label on the container stated that it held two items, Ms. Muncey's blood samples and vaginal secretions. J.A. 287. Agent Bigbee testified that when the Styrofoam container was received by the FBI, the vaginal secretions were no longer in that container. They had been removed and placed in a manila envelope. J.A. 289; J.A. 309.

In addition, Respondent's blood spatter analyst, Paulette Sutton, testified that she found blood mixed with dried mud on Mr. House's blue jeans. The blood had to have come in contact with the mud when the mud was wet. J.A. 294-296. There was no mud at the crime scene. J.A. 308. A creek near the Muncey home was neither adjacent to the body, nor was it between the body and the Muncey residence. J.A. 304. The ground was covered with grass, twigs, and pine needles. National Weather Service records for July, 1985, showed that it had not rained in that area for three full days and that the temperature had been around ninety degrees. J.A. 310. There was no mud on Ms. Muncey's housecoat and nightgown. (Plaintiff's Hearing Exhibits 14a and 15) (physical exhibits returned to custody of state court). The only evidence of wet mud on Mr. House's blue jeans was TBI Agent Scott's testimony that the jeans were soiled with wet mud when they were seized. J.A. 274.

Moreover, Mr. House's missing tennis shoes were discovered after his arrest on different days and at separate locations in the woods across the road near Donna Turner's trailer. They were not in Breeding's and Munsey's possession when they took the autopsy samples and the blue jeans to the FBI Crime laboratory. J.A. 94-95. Agent Bigbee testified that there were bloodstains on the cuff of Mr. House's blue jeans. Ms. Sutton also noted that the bloodstains on the cuff of Mr. House's blue jeans were on both the inside and outside surfaces. J.A. 291-292, 296. The Tennessee Bureau of Investigation tested the shoes for the presence of human blood. The test failed to show the

slightest indication of blood. J.A. 305. Ms. Sutton also tested the shoes for the presence of blood and found none.

The Warden presented no evidence to explain the blood missing from the sample tube, the unsealing and resealing of the Styrofoam box containing the samples of Ms. Muncey's blood, the absence of blood on the tennis shoes Mr. House was wearing on the night of the murder, or the fact that the blood on Mr. House's blue jeans showed similar enzyme activity with Ms. Muncey's badly degraded blood samples obtained during the autopsy. Instead, Respondent's rebuttal was presented by Ms. Sutton and TBI Agent Charles Scott.

Scott testified that he had an independent recollection of seeing reddish-brown stains on some portion of the upper part and the cuff of the right leg of Mr. House's blue jeans when he took them out of the laundry hamper at Donna Turner's trailer. J.A. 274. Scott could point only to the general area where he saw stains. Respondent's Exhibit's 18-f and 18-g, show the front and back of Mr. House's right pants leg. In both photographs, the transfer stains (which adjoin the cuttings in 18-f) are virtually impossible to see unaided, while next to them are other non-blood stains, which are quite similar but much more apparent. J.A. 302, 303. The same holds true for the blood and non-blood stains on the front of Mr. House's jeans.

The record also confirms the faintness of those blood-stains on the outside of Mr. House's jeans. Ms. Sutton testified that there were stains on the jeans that could not easily be seen as blood to the naked eye. She testified that she was unable to determine which stains merited her review until she had examined the stains with a stereomicroscope. J.A. 297-300; J.A. 302, 303. This was consistent with Agent Bigbee's testimony that the stains on the outside of the jeans were so small that he did not expect to detect any enzymatic activity. J.A. 71. The prosecutor even

told the jury during opening argument at trial that the stains were of a type that, "you [the jurors] or I [Phillips] might not detect. Might not see, but which the FBI was able to find on his blue jeans." J.A. 11.

iv. Expert evidence indicates that injuries to Mr. House's body were unrelated to the crime

Dr. Blake examined photographs the police took of bruises on Mr. House's body that the prosecution argued at trial supported its view that House sustained the injuries in a life-and-death struggle with Carolyn Muncey. After being qualified as an expert in the subject, Dr. Blake concluded that each of these injuries were between two and seven days old, too old to have come from a struggle the night before. J.A. 241. Significantly, he also determined that the injury to Mr. House's right ring finger, easily the most severe injury to Mr. House, was not only too old to have been connected with Carolyn Muncey's murder, it was wholly inconsistent with hitting another person because there was no accompanying injuries to the adjoining fingers. J.A. 241-243.

v. Trial counsel did not see key investigation reports that impeached the prosecution's case

House's trial counsel, Chuck Burks, identified a number of significant police investigative reports that were not disclosed to him prior to or during trial. One report showed that House's tennis shoes had been tested and that no blood was found on them. J.A. 257-263. Burks testified that he would have used this report at trial to cast doubt about when the victim's blood came in contact with House's pants. Another police report that Burks had never seen reflects that Hubert Muncey, Jr., told investigators he had had sex with

Carolyn on the morning of July 13. This evidence, Burks testified, would have been important to support the defense argument that Muncey, not House, was the source of the semen stains and thus to discredit the prosecution theory that the motive for the crime was rape. *Id.* at J.A. 264-266.

b. The new evidence showed that Hubert Muncey killed Carolyn Muncey

Finally, House introduced evidence from five new witnesses who directly implicated Hubert Muncey, Jr., as Carolyn Muncey's killer. Each was a lifelong resident of Union County who knew Muncey and had no reason to falsely implicate him in his wife's murder.

i. Muncey argued with his wife at the dance and left thereafter

On the last evening of her life, Carolyn Muncey believed her husband was digging a grave. She was mistaken. Instead of returning home after work, Hubert Muncey went to the Saturday evening dance at the nearby C & C Recreation Center. At some point after she put her children to bed, Carolyn Muncey appeared at the dance and found her husband outside. Mary Atkins, a lifelong Union County resident, testified that she saw Carolyn and Hubert argue in the parking lot, and saw Hubert strike Carolyn. Carolyn then walked away. Atkins was certain that this fight took place on July 13. J.A. 225-230. She also testified that she knew that Muncey had abused Carolyn in the past and that she had previously seen bruises on Carolyn. She testified that she had known Hubert Muncey her entire life and had no animosity toward him.

Police officer Dennis Wallace provided security at the July 13 dance. He testified that Hubert Muncey attended part of it but left between 9:30 and 10:30 p.m., and Wallace did not see Muncey thereafter at the dance. Wallace

testified that he later responded to Muncey's missing persons report; when he arrived at the Muncey house, Muncey was intoxicated and did not appear upset.

ii. Muncey sought to construct a false alibi

Another longtime Union County resident, Artie Lawson, testified that Hubert Muncey came to her house early Sunday morning, July 14. He asked her to tell anyone who inquired that she had seen him at the dance the evening before, and that he had eaten breakfast at her house on Sunday morning at 6:00 a.m. Neither was true, and she refused. J.A. 230-232. She testified that she considered herself a good friend of Hubert Muncey.

iii. Muncey confessed to killing his wife

Two additional witnesses, both life-long friends of Hubert Muncey, Jr., testified about hearing Muncey tearfully confess to killing Carolyn Muncey. Penny Letner recalled that Hubert came to the house of her sister, Kathy Parker, shortly before House's trial. After a short while, he "went to crying and was talking about his wife, and her death and he was saying that he didn't mean to do it." J.A. 232. She testified that Muncey

> said he didn't mean to do it. That she was 'bitching him out' because he didn't take her fishing that night, that he went to the dance instead. He said when he come home that she was still on him pretty heavily bitching him out again, and that he smacked her and that she fell and hit her head. He said I didn't mean to do it, but I had to get rid of her, because I didn't want to be charged with murder.

Id. Letner was 19 years old at the time and had not consumed any alcohol. Muncey's tearful confession scared her and she left immediately. J.A. 233.

Kathy Parker, Letner's sister, testified that she heard the same admission. She also became scared, and she ordered Muncey to leave. She testified that the next day she and her mother went to the Sheriff's Department to report Muncey's remarks, but after being passed off by a couple of deputy sheriffs, she spoke to no one about them. J.A. 234. "There wasn't anybody [sic] talk to me. I couldn't give a statement to anybody. They didn't want to hear it." J.A. 336. Parker also corroborated testimony that the Muncey's marriage was beset by violence. When questioned about whether Hubert Muncey, Jr., abused his wife, Parker said "she was constantly with black eyes and busted mouth." *Id.* at J.A. 235.

iv. Muncey had been plotting to get rid of Carolyn

Hazel Miller, another Muncey friend, also testified. She said that Hubert Muncey had come to her house two to three months prior to Carolyn Muncey's death and told her "he was upset with his wife, that they had had an argument and he said he was going to get rid of that woman one way or the other." J.A. 236. Miller also recalled taking her daughter, Kathy Parker, to the courthouse to report Muncey's confession. *Id.*

v. House testified that he was innocent

Paul House testified, consistent with his defense at trial, that he did not murder Carolyn Muncey, that he did not see or know that her body was off of Ridgecrest Road when he was there searching for Hubert Muncey on July 14, and that he had misled investigators because he was on parole for a sex offense and was afraid to draw attention to himself.

vi. Hubert Muncey, Jr., testified that he was innocent

Hubert Muncey, Jr., testified and denied that he killed his wife. He said that he and Carolyn had a few fights but otherwise got along fine. He testified that he was at the July 13 dance and did not recall leaving before it was over. While he acknowledged knowing Kathy Parker, Penny Letner, Mary Atkins, Artie Lawson and Hazel Miller, he denied any memory of telling them that he had killed his wife, that he wanted to get rid of her, or that he sought an alibi for his whereabouts on July 13 and 14. He could not say why they would want to implicate him falsely in his wife's murder.[9]

2. The District Court's findings

The district court ruled that House's evidence failed to establish that he was factually innocent; thus, it did not reach the merits of his ineffective-assistance-of-counsel-claim. The court made few credibility determinations.[10] With regard to the Letner/Parker testimony, the court did determine that it was "not impressed with the allegations of individuals who wait over ten years to come forward with their evidence." Cert. App. at 131.

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[9] Laura Muncey, now Laura Tharp, testified that she recalled the evening of January 13 when her mother disappeared. Her mother left the house after a man with a deep voice told her that Laura's dad had had a wreck down by the creek. When Laura got up, she did not see anything that had been disturbed in the house, and she said her parents got along fine. She did not recall telling Pam Luttrell that she had heard a car stopping that evening. The court found this testimony highly credible and concluded that it established that Hubert did not assault his wife in their home on the night she disappeared. Cert. App. at 13.

[10] The court found that House was not a credible witness. Cert. App. at 106.

D. The Court of Appeals' Divided Decision

An initial panel opinion affirming dismissal of the petition was withdrawn, and a sharply divided *en banc* court certified three questions to the Supreme Court of Tennessee after the majority determined that the new evidence of innocence created "a serious question or doubt that the defendant is guilty of first degree murder." *House v. Bell*, 311 F.3d 767, 777 (6th Cir. 2002). The dissenters acknowledged that while the new evidence "might convince some, or even most, reasonable jurors that Paul House is actually innocent or should not be convicted," 311 F.3d at 780, they believed that House had failed to meet the *Schlup* standard because, in their view, *Schlup* allows for merits review of a defaulted claim only "if a judge can conscientiously assert that every reasonable juror is almost certain to vote to acquit." *Id.* at 783.

The Warden urged the Tennessee Supreme Court not to respond to the certified questions, and that court (in a departure from prior practice) refused to answer them. The case was then rebriefed in the Sixth Circuit and the *en banc* court voted 8-7 to dismiss House's habeas petition. *House v. Bell*, 386 F.3d 668 (6th Cir. 2004). While the majority agreed that House's new evidence presented a colorable claim of actual innocence, 386 F.3d at 684, it concluded that *Schlup* required more. It reasoned that because House had not discredited each piece of the circumstantial case, he had failed to carry his burden. It opined that sufficient evidence of guilt remained to adequately support the conviction and disallow passage through the *Schlup* gateway.

Seven judges dissented. Six concluded not only that House's new evidence was sufficient to satisfy the *Schlup* gateway requirement and permit review of House's underlying constitutional claims, but also that this was the rare, extraordinary case in which a habeas petitioner has set forth

"a truly persuasive demonstration of 'actual innocence'" within the definition of Justice White's concurring opinion in *Herrera v. Collins*, 506 U.S. 390 (1993). Judge Gilman dissented alone, writing that the new evidence "left him in grave doubt as to which of the . . . two suspects murdered Carolyn Muncey." 386 F.3d at 709. He concluded that the evidence was sufficient to satisfy *Schlup* and that the proper resolution was therefore to grant the writ so that "a new trial would allow a jury to assess House's guilt or innocence free from erroneous introduction of semen evidence, [with] the full knowledge of the controversy surrounding the blood evidence, and with the benefit of the testimony implicating Hubert Muncey." *Id.* at 710.

SUMMARY OF ARGUMENT

Paul House has presented evidence of actual innocence exceeding that required by this Court's holding in *Schlup v. Delo* to allow a habeas petitioner to pass through the procedural gateway and permit federal courts to review the merits of otherwise procedurally defaulted constitutional claims. He has also presented evidence warranting habeas relief on a free-standing claim of actual innocence. *See Herrera v. Collins*, 506 U.S. 390.

In considering House's *Schlup* claim, the lower courts erred grievously in their evaluation of House's post-conviction evidence of innocence. They did so by failing to give reliable, credible evidence of innocence the appropriate weight and failing to consider its significance in light of the purely circumstantial evidence used to convict. They did so also by concluding that solely because some record evidence pointing to guilt remained, House had fallen short of establishing a gateway innocence claim.

The lower courts also erred under *Herrera*. They should have adopted the standard announced in Justice White's concurrence in that case, 506 U.S. at 429, and concluded that House's presentation of new biological and

other physical evidence discrediting every aspect of the prosecution's trial case *and* pointing to a plausible alternative suspect such that no rational juror could vote to convict. They then should have granted immediate relief.

ARGUMENT

Paul House presents a compelling case of actual innocence which warrants relief under settled law. He produced objective scientific evidence disproving the two most incriminating pieces of physical evidence that the prosecution had argued at trial served to link him to the crime. In addition, he presented strong, credible testimony from several unbiased, uninvolved witnesses that Ms. Muncey's husband was her killer. Given the entirely circumstantial case against him and the paucity of credible evidence that remains, House has surely met and exceeded the requirements of *Schlup*. All the court of appeals judges below agreed that Mr. House has "presented a colorable claim of innocence." *See House*, 386 F.3d at 684, 710. Six concluded that he has proven his innocence outright under *Herrera*. *See House*, 386 F.3d at 708. Yet because of the majority's erroneous application of this Court's settled precedent, House's conviction and death sentence stand.

I. HOUSE HAS PRESENTED EVIDENCE WHICH QUANTITATIVELY AND QUALITATIVELY EXCEEDS THAT REQUIRED BY *SCHLUP*

A. *Schlup* Established A Standard For Gateway Claims Of Actual Innocence Which Affords Petitioners Presenting Persuasive Claims A Meaningful Avenue For Review Of Federal Constitutional Violations That Contributed To A Wrongful Conviction

Schlup v. Delo, 513 U.S. at 298, confirmed that a federal habeas court may reach the merits of a petitioner's

otherwise defaulted constitutional claims – that it may allow the petitioner to pass through the procedural "gateway" to the underlying claims – if the petitioner presents new, reliable evidence which undermines confidence in the trial verdict to such an extent that the habeas court finds it more likely than not that no reasonable juror would have voted to convict in light of the new evidence. *See Schlup*, 513 U.S. at 327, 329. The *Schlup* Court embraced the standard set forth in *Murray v. Carrier*, 477 U.S. 478, 496 (1986), and *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), for evaluating gateway innocence claims: that the constitutional error complained of "probably" resulted in the conviction of one who is actually innocent. *See Schlup*, 513 U.S. at 322. In so doing, the Court explicitly rejected the "more exacting" standard announced in *Sawyer v. Whitley*, 505 U.S. 333 (1992), for cases in which capital sentencing error rather than a mistaken conviction was in controversy: that the habeas petitioner "'must show *by clear and convincing evidence* that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty.'"[11] *Schlup*, 513 U.S. at 323 (quoting *Sawyer*, 505 U.S. at 336 (emphasis in *Schlup*)). In explaining its adoption of the *Carrier* standard for gateway claims of actual innocence, the Court emphasized the "equitable nature of habeas corpus," 513 U.S. at 319, and concluded that it was critically important to maintain a standard for evaluating gateway innocence claims which affords a petitioner in the "extraordinary" case presenting persuasive evidence of mistaken identity a "meaningful avenue by which to avoid a manifest injustice." *Id.* at 327.[12]

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[11] The petitioner in *Sawyer* asserted that he was "actually innocent" of the death penalty and that his death sentence was therefore improper. *See Schlup*, 513 U.S. at 323.

[12] In adopting the *Carrier* standard, the Court by no means ignored the impact of gateway claims of innocence on the systemic interest in

(Continued on following page)

After announcing that the *Carrier* standard applies to gateway innocence claims, the Court provided lower courts with several guiding principles for evaluating such claims. First, the petitioner should succeed under *Schlup* only if he persuades the habeas court that "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 329. Second, the petitioner must present *reliable* evidence, such as credible eyewitness accounts, exculpatory scientific evidence, or other critical physical evidence. *Id.* at 324. Third, the habeas court must make its gateway determination in light of *all the evidence* – both that adduced at trial and that newly presented – and must determine whether sufficient evidence of guilt remains unaffected by the new evidence so that a reasonable juror would still find the petitioner guilty beyond a reasonable doubt. *Id.* at 327-328, 331-332. Fourth, the Court was explicit that the habeas court must not substitute its own judgment for a jury's but must consider the evidence of innocence from the perspective of a "reasonable, properly instructed juror" conscientiously following instructions to consider all the evidence fairly and to hold the State to its burden of proving guilt beyond a reasonable doubt. *Id.* at 329, 331.

In Paul House's case, these principles have been disregarded by a bare majority of the court below. Under *Schlup*, House's presentation of solid scientific evidence discrediting the most incriminating physical evidence

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"finality, comity, and conservation of judicial resources." *Schlup*, 513 at 322. The Court painstakingly considered these interests and at the same time recognized that "[c]laims of actual innocence pose less threat to scarce judicial resources and to principles of finality and comity" than do other sorts of claims and that "a substantial claim that constitutional error has caused the conviction of an innocent person are extremely rare." *Id.* at 324.

against him in an entirely circumstantial case, *plus* the unbiased testimony of several witnesses that another plausible suspect was the real culprit, should have led the courts below to find that such a showing undermines confidence in the outcome of his trial sufficiently that no reasonable juror knowing all of this evidence existed would persist in believing House guilty beyond a reasonable doubt. The particular failings that led the Sixth Circuit majority to a manifestly improper application of *Schlup* are detailed in the following sections.

B. House's Evidence Of Innocence Exceeds The Requirements Of *Schlup*

House provided the district court with every type of evidence *Schlup* cited as necessary to establish a "credible" gateway claim of actual innocence, "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup*, 513 U.S. at 324. His exculpatory scientific and critical physical evidence included the results of DNA testing that conclusively exclude House as the source of the semen found on Ms. Muncey's nightclothes and thereby obliterate the most incriminating physical evidence adduced at trial to link him to the victim. The disclosure that the prosecution's dramatic semen evidence was wrong, valueless and misleading insofar as it purported to identify House as Carolyn Muncey's assailant literally cuts the core out of the State's case by destroying the only motive – rape – that the prosecution urged upon the jury as an explanation for why House might have attacked and murdered Ms. Muncey. In addition, postconviction analysis of the prosecution's blood evidence by a respected, experienced, state-employed expert also reveals a strong likelihood that Ms. Muncey's blood ended up on House's clothing not because House bludgeoned her, but because the negligent or deliberate

mishandling of physical evidence by law enforcement agents put that blood on the clothing *en route* to the FBI lab. It is inconceivable that any reasonable juror would dismiss *both* of these revelations *together* as grounds for doubt about the State's case.

House has also exceeded the evidentiary requirement of *Schlup* by presenting "trustworthy eyewitness accounts" pointing to a credible alternative suspect: Hubert Muncey, Jr. *See House*, 386 F.3d at 683 ("House not only presented evidence to the district court that undermined the case against him, he also offered an alternative theory of the crime: that Mr. Muncey killed his wife."). Several witnesses who were lifelong friends of the Munceys and had no connection to Mr. House testified during the federal habeas hearing to detailed, first-hand accounts of Ms. Muncey's abusive husband declaring his intention to "get rid of . . . [her] one way or the other," confessing that he had killed her, and attempting to establish a false alibi for the time of the killing. *See House*, 386 F.3d at 702 (Merritt, J., dissenting, "Hours before his wife's body was found, Muncey . . . tried to establish an alibi for Saturday night. He in fact had no alibi. He left the dance an hour and a half early and is unable to account for his whereabouts at the very time the county coroner gave as his best estimate as the time of death. Then, early the next morning before the body was discovered, he went to Ms. Lawson in an effort to enlist her help in establishing an alibi."); *id.* at 708 (characterizing Letner and Parker as "having no connection to House and no bias against Mr. Muncey").

It is undisputed that Penny Letner and her sister, Kathy Parker, have been friends of Hubert Muncey, Jr., since they were all children. Hazel Miller and Artie Lawson had also known Muncey for years. *See House*, 386 F.3d at 699, 701. It is also undisputed that there has been no ill will between Muncey and Letner, Parker, Miller, or Lawson. *Id.* Finally, it is undisputed that Letner, Parker,

Miller, and Lawson do not know Paul House and have no reason to want to exonerate him – other than allegiance to the truth of facts they learned and are unwilling to deny. As *Schlup* made clear, the motives and loyalties of post-conviction witnesses who cast doubt on the prosecution's case for guilt at trial are crucially important. *See Schlup*, 513 U.S. at 316 (citing as "particularly relevant" to Schlup's innocence claim that he had presented affidavits of African-American inmates "attesting to the innocence of a white defendant in a racially motivated killing").

In sum, House's evidence dismantling the prosecution's case for guilt *while at the same time* pointing to a highly plausible alternative perpetrator amounts to "*Schlup* plus." Yet the district court and the Sixth Circuit concluded that "*Schlup* plus" somehow fell short of the requirements set forth in *Schlup* for establishing a gateway claim of actual innocence.

C. The Courts Below Misapplied *Schlup* By Viewing House's Evidence Of Innocence In Isolation From The Prosecution's Case At Trial

Schlup requires a habeas court to evaluate a petitioner's new evidence of innocence holistically and in the context of the evidence presented – and relied upon to convict– at trial. *See Schlup*, 513 U.S. at 328 ("The habeas court must make its determination concerning petitioner's innocence in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.") (internal quotation marks omitted); *id.* at 331-32 ("In applying the *Carrier* standard to such a request, the District Court must assess the probative force of the newly presented

evidence in connection with the evidence of guilt adduced at trial."); *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986).

The Sixth Circuit majority acknowledged that "[House] has presented a colorable claim of actual innocence." *House*, 386 F.3d at 684-685. Yet, contrary to *Schlup*, it proceeded to evaluate each piece of House's postconviction evidence in isolation, without considering the effect the new evidence would have had on a reasonable juror's assessment of the actual case presented by the prosecution at trial. Following the lead of the district court, the Court of Appeals majority examined each piece of testimonial and biological evidence singly and opined as to each one, separately, why it alone failed to undo the prosecution's case against House. *Id.* (discussing and dismissing *seriatim* the Letner and Parker testimony, Hubert Muncey's attempt to concoct an alibi, the semen evidence, the blood on the jeans, and the absence of blood on House's shoes). Two clear examples of the lower courts' failures to properly analyze House's evidence of innocence are their treatment of Dr. Blake's testimony and their treatment of the testimony of Ms. Parker and Ms. Letner.

Dr. Blake, the Assistant Chief Medical Examiner for the State of Tennessee and a witness who overwhelmingly testifies for the prosecution in criminal cases, testified for Mr. House that the enzymatic degradation of the blood staining the jeans led him to conclude that the blood was spilled on the jeans *after* it had been collected from Ms. Muncey's body, and that it did not land on the jeans while she was still alive. J.A. 250, 251. The district court weighed this evidence – based on scientific analysis by a qualified expert – against testimony by Agent Scott that he saw "what appeared to be blood stains" on House's jeans when he collected them from Turner's trailer. Cert. App. at 109; *House*, 386 F.3d at 681 (recounting the district court's summary of Agent Scott's testimony about discovering the jeans: "The jeans had 'reddish brown'

stains that *he suspected was* [sic] blood on the upper part of the jeans and near the cuff." [emphasis added]). The district court opined that Dr. Blake's expert scientific testimony did not "negate" Agent Scott's *suspicion* that he saw blood on the jeans, and therefore failed to undermine sufficiently the trial evidence against House.[13] Cert. App. at 132.

Given the prosecutors' central reliance on the blood evidence to secure House's conviction at trial, the district court's conclusion and the circuit's affirmance of it cannot be reconciled with *Schlup*. *Schlup* requires habeas courts to consider new evidence, from the perspective of a reasonable juror "in connection with the evidence of guilt adduced at trial." *See Schlup*, 513 U.S. at 328, 329, 331-332. In connection with a purely circumstantial case in which the prosecution has tied the defendant to his alleged victim by insisting that her blood was found on his jeans, it is altogether unworldly to suppose that reasonable jurors would fail to perceive a reasonable doubt when an acknowledged

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[13] The district court recognized, "Without question, one or more tubes of Ms. Muncey's blood spilled at some time. However, the court concluded that "the spillage occurred after the FBI crime laboratory received and tested the evidence." Cert. App. at 131. This finding is wholly unsupported by the record. *See, infra* at 20-24. The record evidence establishes that: (1) Dr. Carabia did not seal the tubes after he drew Ms. Muncey's blood samples, H. T. III 127; (2) when the Styrofoam box was opened at the FBI, the box had previously been opened and resealed, *id.*, at 152-53; (3) the vaginal secretion evidence that had been packed with the blood was no longer in that box, *id*, at 155-57; and (4) at least half a tube of blood is not accounted for. It was not used in the FBI testing, and the leakage inside the box concerned a small amount of blood. *See* Plaintiff's Exhibit 8. The district court did not address any of these facts and relied heavily upon Agent Scott's speculation that stains on the jeans were bloodstains. But the evidence is clear that the *blood* stains on House's pants were so minute and fine that they had to be observed with a microscope. Whatever brownish-appearing stains Scott could see were *not* bloodstains. At trial, the Attorney General told jurors that they could not see the bloodstains on the jeans. J.A. 11.

forensic expert who is employed by the State and who routinely testifies for the prosecution in criminal cases discovers and attests that the blood on the jeans actually got there through law enforcement authorities' mishandling of potential evidentiary materials. *See Schlup*, 513 U.S. at 329 ("It must be presumed that a reasonable juror would consider fairly all of the evidence presented. It must also be presumed that such a juror would conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt."); *id.* at 316 (noting that the source of the new evidence is significant); *see also House*, 386 F.3d at 686 (Merritt, J., dissenting, "Dr. Blake has testified for the prosecution . . . in hundreds of cases.").

The lower courts were similarly misguided in dismissing the Letner and Parker testimony recounting Mr. Muncey's confession. The district court disparaged their accounts on the ground that they allegedly waited too long to come forward. Cert. App. at 131; *House*, 386 F.3d at 684. This is unsupportable. First, the record contains unrebutted evidence, which the district court never acknowledged, that Ms. Parker attempted to report the confession to authorities but was unable get anyone to listen to what she had heard that contradicted the State's case-in-the-making against Mr. House. Cert. App. at 96; *House*, 386 F.3d at 683. Second, in *Schlup* itself this Court recognized that the district court had discounted Schlup's affidavits for the very same reasons the district court here has discounted the Parker and Letner testimony. *Schlup*, 513 U.S. at n. 19 ("The District Court focused primarily on the 'suspect' nature of affidavits that are produced after a long delay."). Yet, that credibility determination did not deter this Court from concluding that the affidavits were probative new evidence of a gateway innocence claim. And in Mr. House's case, the testimony brushed aside by the courts below came from two lifelong friends of Mr. Muncey; they had no motive to implicate him falsely in his wife's

murder; their timely attempts to report his confession to authorities were rebuffed; and when they were finally allowed to tell their story in court, the district court declared it tardy. *House*, 386 F.3d at 364.

This approach flouts *Schlup*'s requirement that a habeas court consider new evidence of innocence from the perspective of a reasonable juror. As with Dr. Blake's testimony, it is impossible to imagine that in an entirely circumstantial case, reasonable jurors would fail to appreciate the doubt cast on Mr. House's identity as the killer of Ms. Muncey when two witnesses who have long known her husband and who have no animus against him testify consistently – consistently with one another and with Hubert Muncey, Jr.'s previous abuse of his wife[14] – that they heard him admit to having gone too far at last and killed her. The lower courts' depreciation of this compelling evidence simply cannot be squared with the promise of *Schlup* that the gateway innocence standard it endorsed would provide wrongly convicted individuals a "meaningful avenue by which to avoid a manifest injustice."

Two additional points about *Schlup* highlight the force of Mr. House's gateway showing. (1) *Schlup* was not a circumstantial case. Two corrections officers who were eyewitnesses to the crime had identified Schlup as the culprit. *Schlup*, 513 U.S. at 302. (2) Schlup's postconviction showing did not involve exculpatory physical evidence. *Id.*; *id.* at 310-313. Yet, this Court strongly suggested that the affidavits which Schlup presented in federal habeas raised sufficient doubt about his guilt to allow consideration of his constitutional claims, *even*

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[14] *See also State v. House*, 743 S.W.2d 141, 143 (Tenn. 1987) (recognizing that the Munceys "had been having marital difficulties and that ... [Ms. Muncey] had been contemplating leaving ... [Mr. Muncey]").

though Schlup's habeas evidence by no means negated every incriminating piece of evidence in the record. Id. at 332; *id.* at n. 19. By contrast, the prosecution's case against Mr. House at trial was entirely circumstantial. *House*, 386 F.3d at 671 (quoting *State v. House*, 743 S.W.2d 141, 142-44 (Tenn. 1987)). Mr. House's postconviction showing did include physical and expert forensic evidence which discredited – and, in regard to the prosecution's semen evidence, obliterated outright – the prosecution's circumstantial case. Yet the courts below found that Mr. House could not meet the *Schlup* gateway standard because this evidence did not dissipate each and every single shred of the State's tattered circumstantial web.[15]

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[15] The wholly circumstantial nature of the case against House at trial bears emphasis. Tennessee courts have long applied the rule that when a criminal case is based exclusively on circumstantial evidence, the defendant may not be convicted unless the facts and circumstances are "so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." *State v. Crawford*, 470 S.W.2d 610, 612 (Tenn. 1971); *Collins v. State*, 445 S.W.2d 931, 932 (Tenn.Crim.App. 1969); *State v. Transou*, 928 S.W.2d 949, 955 (Tenn.Crim.App. 1996). At trial, House was unable to rebut much of the circumstantial case against him, and he was therefore convicted. But he has now dismantled nearly every piece of circumstantial evidence the jury heard. The only pieces of the prosecution's case which remain unchallenged are that House lied to authorities about an alibi and that he has a deep voice such as the one the victim's daughter said she heard on the night her mother disappeared. *House*, 386 F.3d at 685. This surely would not have been enough for the jury to conclude that "the finger of guilt is pointed unerringly at the defendant and the defendant alone[.]" *Crawford*, 470 S.W.2d at 613 (holding that in order to convict on circumstantial evidence alone the facts and circumstances must be so interconnected as to point exclusively at the defendant's guilt). Moreover, House has painted a plausible picture of Hubert Muncey, Jr. as the actual perpetrator of the crime.

D. The Courts Below Misapplied *Schlup* By Rejecting House's Gateway Claim Solely On The Basis Of A Finding That The Record Contained Sufficient Remaining Evidence To Support A Verdict Of Guilt

Both the Sixth Circuit majority and the district court evaluated Mr. House's evidence of innocence exactly as *Schlup* directs courts *not* to: they clung to the slivers of incriminating evidence remaining after House had upended the pillars of the prosecution's case at trial and had even presented credible evidence identifying an alternative perpetrator. *See Schlup*, 513 U.S. at 331 ("petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict"). To compound the error, the Circuit Court majority engaged in rank speculation as to how Mr. House might plausibly still be guilty. *House*, 386 F.3d at 685 ("We note that the fact that mud may not have been present at the crime scene, and may have been scarce in the surrounding area, cannot be taken as proof that there was no mud anywhere on the route between Ms. Turner's trailer and the scene of the crime."; "The lack of any blood spatter on House's shoes is inconclusive as well, because it is not clear when House took his shoes off.").

The clearest example of the Sixth Circuit majority's failure to follow *Schlup* in this regard is its blithe dismissal of the undisputed DNA evidence disproving the prosecution's semen-source theory of House's identity as the killer. The *only* motive the prosecution ascribed to House at trial that could have given him a reason to assault and kill Ms. Muncey was rape; the most powerful evidence of his guilt at trial – and the central basis for his conviction – was the prosecution's claim that the semen found on her clothing was House's semen; and now House has successfully demonstrated – beyond any doubt – that

the semen found on Ms. Muncey's clothing was that of her husband alone. Yet, the Sixth Circuit majority, in the face of this *total* elimination of *any* evidence tending to establish rape as the motive for the Muncey murder, reasoned that it remains speculatively possible that Mr. House may nevertheless have sexually assaulted and then murdered Ms. Muncey. *See House*, 386 F.3d at 685 ("[T]he fact that semen found on the victim's clothing came from her husband and not from House does not contradict the evidence that tends to demonstrate that he killed her after journeying to her home and luring her from her trailer, *nor does the lack of any physical evidence of sexual contact* contradict the notion that the murderer lured Ms. Muncey from her home with a sexual motive.") (emphasis added). In other words, all Mr. House has done is to show that there is not and never was a scintilla of valid evidence that Ms. Muncey was sexually assaulted; and that does not affirmatively negate the conjectural possibility that she *may have been*. This possibility is, of course, entirely fantastical; it is no more plausible than that Ms. Muncey's killer was bent on robbery, revenge, or some other purpose of which no evidence can be found. *See id.* at 686 (Merritt, J., dissenting, "There is now absolutely no evidence of sexual assault. The new evidence disproves the motive the jury accepted as the basis for the kidnapping [sic] and murder. . . ."); *id.* at 690-694 (Merritt, J., dissenting and detailing the State's reliance on the semen as proof of rape as the motive for the murder throughout House's trial and direct appeal).

The DNA evidence excluding Mr. House as the source of the semen has established that his conviction was obtained on a factual theory that was utterly false: that he raped Ms. Muncey before murdering her. The Sixth Circuit majority's steadfast insistence on insulating that conviction from review by substituting factually baseless speculation for the prosecution's proven false evidence is irreconcilable with *Schlup*. *See Schlup*, 513 U.S. at 331;

and compare id. at 309, n. 19 (noting that the district court evaluating Schlup's innocence claim weighed heavily the "'suspect'" nature of affidavits produced after a long delay and concluded that the affidavits Schlup presented attesting to his innocence as compared to the positive identifications of Schlup by two prison guards "failed to constitute a sufficiently persuasive showing of actual innocence") *with House*, 386 F.3d at 684-685 (concluding that House's inconsistent statements about his whereabouts the night of the murder and about the source of his injuries coupled with Laura Muncey's testimony that someone with a deep voice summoned her mother and with Sutton's testimony that the mud and blood were mixed on the jeans outweighed the evidence of Hube Muncey's confession and attempt to concoct an alibi, the lack of blood on House's shoes, the proof that the semen was Muncey's, and the testimony of, among others, the Assistant Chief Medical Examiner of the State of Tennessee, pointing to the blood's spilling on the jeans *en route* to the lab).

No gatekeeper faithful to *Schlup* can fairly review all the new evidence House has presented and conclude that it is insufficient to undermine confidence in the outcome of his trial for the purpose of establishing *Schlup*'s threshold showing of innocence warranting passage through the gateway to his underlying constitutional claims. *See Schlup*, 513 U.S. at 316-17("[I]f the habeas court were . . . convinced that [the] new facts raised sufficient doubt about Schlup's guilt to undermine confidence in the result of the trial without the assurance that the trial was untainted by constitutional error, Schlup's threshold showing of innocence would justify a review of the merits of the constitutional claims.").

The Sixth Circuit majority's treatment of House's new evidence of innocence is significantly out of line with a number of other courts that have granted passage through

the *Schlup* gateway after considering similar evidence discrediting the incriminating evidence which formed the basis for the petitioner's conviction, even where such evidence failed to negate every piece of incriminating evidence.[16] These cases demonstrate that in order for

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[16] *See Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005) (concluding that because the only physical evidence upon which Souter's conviction rested – the alleged fact that he had assaulted the victim with a liquor bottle found at the crime scene – had been discredited, and the remainder of the case against him was entirely circumstantial, he had succeeded in meeting the *Schlup* standard); *id.* at 596 ("The circumstantial facts, when taken together, are insufficient to establish Souter's guilt. The only direct evidence linking Souter to [the victim's] death is the bottle. In light of the new evidence . . . we find that it surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict."); *Lucas v. Johnson*, 132 F.3d 169 (5th Cir. 1998) (granting passage through *Schlup* where the petitioner had confessed, and the confession was the centerpiece of the prosecution's case; on habeas, petitioner presented, *inter alia*: an audit from his employer indicating that he was at work at the time of the crime; a confession expert's testimony that the petitioner was prone to false confessions; and a report from the Texas Attorney General indicating that the petitioner was out of state when the crime took place); *Paradis v. Arave*, 130 F.3d 385, 396 (9th Cir. 1997) (granting passage through the *Schlup* gateway and discussing the impact of medical records which were *Brady* material never turned over to the defense which strongly suggested that the victim died in neither the time nor the place the prosecution had argued at trial and concluding that "[u]nder such an assessment of the medical evidence, the circumstantial evidence relied upon in Paradis' conviction would be conclusively contradicted by the medical evidence available from the record" and determining that "it may be more likely than not that no reasonable juror would have found Paradis guilty beyond reasonable doubt of having killed [the victim] in Idaho"); *Carriger v. Stewart*, 132 F.3d 46 (9th Cir. 1997) (vacating district court opinion and remanding with instructions to grant writ after granting passage through *Schlup* and finding that the petitioner's underlying constitutional claims had merit; petitioner's conviction was based on a prison informer's testimony that the petitioner had confessed to the informer and on physical evidence to which the informer led police; on habeas, petitioner presented evidence that the informer himself had confessed several times to the capital murder for which petitioner had

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been convicted; the informer also confessed under oath in open court during habeas proceedings (but later recanted); the informer's confessions accurately described details of the crime that only the perpetrator would have known; the informer's corrections record showed that his m.o. was to commit violent crimes and then shift the blame to others).

District Courts are in accord with this approach. *See Watkins v. Miller*, 92 F. Supp. 2d 824 (S.D. Ind. 2000) (granting passage through *Schlup* where the petitioner presented DNA test results showing that he was not the source of the semen on the victim, which disproved the only theory the state presented at trial: that the petitioner alone raped and murdered the victim; discounting the state's postconviction arguments that it was possible that the petitioner and another person raped the victim, or that the petitioner murdered but did not rape the victim, where "the trial record contains not a hint of a suggestion that two different people were responsible for [the] rape and murder"); *Garcia v. Portuondo*, 334 F. Supp. 2d 446 (S.D.N.Y. 2004) (granting passage through *Schlup* where single eyewitness presented the only evidence against petitioner; and the petitioner's postconviction evidence included: proof that petitioner had been incarcerated in the Dominican Republic until a few hours before the murder took place in the Bronx; affidavits from alibi witnesses; evidence that the eyewitness had been taking several prescription drugs at the time of the murder, lineup, and trial; the court found probative that the jury heard none of the evidence establishing that the petitioner had been in the D.R. on the day of the murder even though it was theoretically possible that he could have made it to New York in time to commit the crime, "The fact that the petitioner was in jail in another country hours before the murder, especially when considered with all of the other alibi evidence, argues strongly against his participation in the murder, even without knowing whether he could have made the plane to New York."); *Reasonover v. Washington*, 60 F. Supp. 2d 937 (E.D. Mo. 1999) (granting passage through *Schlup* where the petitioner presented: tapes, made without their knowledge, of conversations between her and her alleged accomplice indicating that they were not involved in the crime; and tapes between petitioner and one of the cellmates to whom she allegedly confessed indicating that the cellmate lied about the confession; the court reasoned that the cellmate's testimony was the "linchpin" of the state's case, and therefore its being discredited significantly undermined the remaining evidence of guilt, which was either predicated on that alleged confession or was much weaker than the confession); *Richter v. Bartee*, 973 F. Supp. 1118 (D.Neb. 1997) (allowing passage through *Schlup* where no physical evidence linked the petitioner to the rape and the only evidence against him was the victim's tentative photo

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courts to afford petitioners a meaningful avenue by which they may overcome a procedural bar, as this Court mandated in *Schlup*, 513, U.S. at 327, they must weigh new evidence of innocence against the evidence the jury heard at trial. Physical evidence which disproves a circumstantial case against the defendant is the gold standard for establishing *Schlup* claims. *See Souter*, 395 F.3d 596-597; *Paradis*, 130 F.3d at 396; *Watkins*, 92 F. Supp. 2d at 838.

Even in cases where some evidence of guilt remains, a plausible postconviction showing which discredits key aspects of the prosecution's case at trial warrants passage through the *Schlup* gateway. *See Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004); *Garcia v. Portuondo*, 334 F. Supp. at 455. In cases where the trial evidence is weak or where there is only one witness to the crime, impeachment of the linchpin witness is often enough. *See Carriger*, 132 F.3d at 478; *Reasonover*, 60 F. Supp. 2d at 962-963, 964; *Richter*, 973 F. Supp. at 1130; *Bragg*, 128 F. Supp. 2d at 601, 603. We have found no case other than the Sixth Circuit's decision in *House* in which a court has been presented with both physical evidence disproving the case for guilt at trial *and* credible testimony pointing to an alternate suspect, yet has held that the petitioner has failed to meet the *Schlup* standard. To allow this aberrational precedent to stand would betray *Schlup*'s promise of a meaningful avenue for review for the handful of habeas

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identification of him; postconviction evidence included: alibi, forensic showing that the victim's wounds were self-inflicted; psychiatric, showing that the victim had a mental disorder which would render her incapable of distinguishing reality; and evidence that the victim made a false report of rape involving similar events a year after the incident for which petitioner was convicted); *Bragg v. Norris*, 128 F. Supp. 2d 587 (E.D. Ark. 2000) (holding that where petitioner presented ample evidence discrediting the trial testimony of the undercover agent which was the linchpin of the prosecution's case, the petitioner was allowed to pass through the *Schlup* gateway).

petitioners presenting credible claims of actual innocence and procedurally defaulted constitutional claims.

II. HOUSE HAS PRESENTED SUFFICIENT EVIDENCE OF INNOCENCE TO ESTABLISH A FREE-STANDING CLAIM WARRANTING HABEAS RELIEF

Six judges of the *en banc* Court of Appeals concluded that House has presented the quality and quantity of evidence required to establish a free-standing claim of actual innocence under *Herrera*. *House*, 386 F.3d at 708. Although this Court assumed without deciding in *Herrera* that such a free-standing claim of actual innocence would be cognizable under the appropriate circumstances, the lower federal courts are split as to whether such a free-standing claim of actual innocence could by itself establish a constitutional violation warranting habeas relief. *See Herrera*, 506 U.S. at 417 (referring to the "assumed right" of a capital habeas petitioner who has made a "truly persuasive demonstration of 'actual innocence' to be spared from execution); *id.* at 419.[17]

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[17] *See, e.g.*, *Boyde v. Brown*, 404 F.3d 1159 (9th Cir. 2005) (recognizing the possibility of a free-standing claim of actual innocence); *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997); *Noel v. Norris*, 322 F.3d 500 (8th Cir. 2003); *Whitfield v. Bowersox*, 324 F.3d 1009 (8th Cir. 2003); *Clayton v. Gibson*, 199 F.3d 1162 (10th Cir. 1999); *O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1995) (assuming *arguendo* the possibility of a free-standing actual innocence claim based on a truly persuasive showing of innocence); *Spencer v. Murray*, 5 F.3d 758 (4th Cir. 1993); *Hazel v. United States*, 303 F. Supp. 2d 753 (E.D. Va. 2004); *cf. Milone v. Camp*, 22 F.3d 693 (7th Cir. 1994) (recognizing the possibility of a free-standing innocence claim under *Herrera* but only in capital cases). *See also Conley v. United States*, 323 F.3d 7 (1st Cir. 2003) (noting in *dicta* that *Herrera* left open the question whether a free-standing claim of actual innocence is cognizable in federal habeas); *Lucas v. Johnson*, 132 F.3d at 1075 (same); *Cherrix v. Braxton*, 131 F. Supp. 2d 756 (E.D. Va. 2001); *Hartman v. Bagley*, 333 F. Supp. 2d 632

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Given the overwhelming evidence developed during federal habeas that the prosecution's trial case is improbable and resulted in the conviction of the wrong man, Mr. House urges this Court to recognize what six judges of the Court of Appeals did: that *Herrera* did establish the possibility of a free-standing claim of actual innocence when a habeas petitioner meets the requisite "extraordinarily high" threshold; and that Paul House has met that threshold and deserves immediate relief.[18]

A. Justice White's Concurrence In *Herrera* Sets Forth The Appropriate Standard For Free-Standing Habeas Claims Of Actual Innocence

Although the *Herrera* majority assumed that a prisoner who meets the "extraordinarily high" threshold of a free-standing claim for actual innocence would be entitled to federal habeas relief, the majority opinion stopped short of establishing what that showing would require. However, Justice White's brief concurrence sets forth a standard which strikes the appropriate balance of affording relief to prisoners who have made a truly persuasive showing of free-standing actual innocence while protecting the State's interest in the finality of convictions and screening out frivolous claims. Justice White's standard demands a showing "based on proffered newly discovered evidence and the entire record before the jury that convicted him, [that] 'no rational trier of fact could find proof of guilt

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(N.D. Ohio 2004); *Lyon v. Senkowski*, 109 F. Supp. 2d 125 (W.D.N.Y. 2000). *See also LaFevers v. Gibson*, 238 F.3d 1263 (8th Cir. 2001) (citing *Herrera* and concluding that it established that no free-standing claim of actual innocence is cognizable in federal habeas); *Sibley v. Culliver*, 377 F.3d 1196 (11th Cir. 2004) (same).

[18] House pled a *Herrera* claim in his federal habeas petition. D.Ct. Docket 73 at 28-29.

beyond a reasonable doubt.'" *Herrera*, 506 U.S. at 429 (quoting *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)); *see also id.* at 426 (O'Connor, J., concurring and discussing the State's interest in finality and courts' interest in limiting frivolous actual innocence claims).

Justice White's proposed standard differs from the lower standard set forth in *Schlup* in several respects: First, by substituting the "rational" juror for the "reasonable" juror and by requiring a showing that no juror *could* vote to convict, not just that they would not. *Cf. Schlup*, 513 U.S. at 327, 330 ("Under *Jackson*, the use of the word 'could' focuses the inquiry on the power of the trier of fact to reach its conclusion. Under [*Murray v.*] *Carrier* [, 477 U.S. 478 (1986) no reasonable juror would vote to convict], the use of the word 'would' focuses the inquiry on the likely behavior of the trier of fact."); *see House*, 386 F.3d at 689. Second, in a *Jackson/Herrera* inquiry, credibility determinations are outside the scope of review. *Schlup*, 513 U.S. at 330 (noting that credibility assessments are generally "beyond the scope of review," whereas under the gateway/*Carrier* standard, "the newly presented evidence may indeed call into question the credibility of witnesses presented at trial . . . [and] the habeas court may have to make some credibility assessments"). Finally, under *Jackson*, and likewise under Justice White's proposed standard in *Herrera*, "the mere existence of sufficient evidence to convict would be determinative of petitioner's claim[.]" *Schlup*, 513 U.S. at 330.

In short, the standard proposed by Justice White and the Sixth Circuit dissent in this case for evaluating free-standing claims of actual innocence, would require the habeas court to determine simply whether as a matter of law, regardless of credibility determinations and in light of the newly presented evidence, any rational trier of fact could vote to convict. Mr. House urges the Court to adopt

this standard. He also urges the Court to hold that even when his case is held to this heightened scrutiny, Paul House deserves relief.

B. House Has Established His Innocence Even Under The "No Rational Juror" Standard

As discussed in detail above, by any fair reading House has succeeded in razing the pillars of the prosecution's case against him. He has also gone further and provided credible evidence pointing to Hubert Muncey's guilt of the crime. In other words, he has not only undermined the case for his conviction; he has presented a persuasive affirmative case of innocence. He has done so by adducing biological evidence as well as witness accounts that without question would have been probative in the rational juror's evaluation of this purely circumstantial case. *See* note 14, *supra* (citing Tennessee cases establishing the standard for conviction in a circumstantial case); *Herrera*, 506 U.S. at 418 (recognizing that even "suspect" affidavits proffering hearsay presented over a decade after trial would be of probative value for the jury).

Without unassailed physical evidence, without a motive, without eyewitnesses, without a confession, and without convincing circumstantial evidence linking him to the crime,[19] no rational juror would have any basis for

[19] Without the blood and semen, the only circumstantial evidence remaining against House are: the fact that he has a low voice and the victim's daughter heard someone with a low voice summon he. mother; the questionable circumstances under which House encountered Billy Ray Hensley on the road near the Munceys' driveway in the vicinity where the body was discovered; the fact that House lied about his whereabouts the night of the murder and the sources of the injuries he displayed when questioned by police. Surely these thin reeds cannot be

(Continued on following page)

convicting House beyond a reasonable doubt. Add to that the rational juror's consideration of testimony from several lifelong friends of the victim's husband that he had a history of abusing her, admitted to killing her during one of his assaults, lied about his whereabouts the night of her death, and attempted to fabricate an alibi, and there is no escaping reasonable doubt. *See House*, 386 F.3d at 708 ("[T]here is no evidence of a motive for House. All of the state's physical evidence, both blood and semen, allegedly tying House to the murder, has been effectively rebutted. The new . . . evidence as a whole so completely undermines the case against House and establishes a persuasive case against Muncey that, had it been presented at trial, no rational juror could have found evidence sufficient for conviction.").[20]

Put simply, viewing the trial and habeas evidence as a whole, there remains no legal or factual basis upon which to hang Paul House's conviction, and there is plenty of basis for reversing it. A petitioner who has demonstrated as much warrants immediate relief.

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characterized as establishing guilt beyond a reasonable doubt, especially when weighed against the new evidence of innocence.

[20] *See also Carriger*, 132 F.3d at 477 (suggesting that the petitioner might have established a claim under *Herrera* if he would have shown that "new and reliable physical evidence, such as DNA, . . . would preclude any possibility of . . . guilt" and recognizing that another inmate's confession to the crime exonerating the petitioner "does constitute some evidence tending affirmatively to show [his innocence]"); *Turner v. Calderone*, 281 F.3d 851, 873 (9th Cir. 2002) (stating in *dicta* that a claim under *Herrera* could be established if the petition presents "affirmative proof of actual innocence based on newly discovered evidence"); *Cherrix v. Braxton*, 131 F. Supp. 2d at 766 (recognizing that DNA testing "substantially more advanced" than that used at trial may suffice to exonerate the petitioner and warrant relief under *Herrera*).

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

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In The Supreme Court of the United States

PAUL GREGORY HOUSE,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the majority below err in applying this Court's decision in *Schlup v. Delo* to hold that petitioner's new evidence was insufficient to excuse his procedural default in the Tennessee state courts?

2. What constitutes a "truly persuasive showing of actual innocence" pursuant to *Herrera v. Collins* sufficient to warrant freestanding habeas relief?

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The opinion of the court of appeals (J.A. 394) that is the subject of this case is published at 386 F.3d 668. The memorandum opinion of the district court dismissing the petition for writ of habeas corpus is unreported. (J.A. 314)

STATUTORY PROVISIONS INVOLVED

This case involves an interpretation of 28 U.S.C. §§ 2244 and 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which are set forth in pertinent part in an appendix to this brief. App., *infra*, 1a.

STATEMENT OF THE CASE[1]

I. Trial and Direct Appeal

Paul Gregory House (hereinafter "petitioner" or "House") was convicted in 1986 for the first degree premeditated murder of Carolyn Muncey in Union County, Tennessee. The jury sentenced House to death after unanimously finding three aggravating circumstances: (1) that House was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person; (2) that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; and (3) that the murder was committed while House was engaged in committing, or was attempting to commit, rape or kidnapping. Tenn. Code Ann. §§ 39-2-203(i)(2), (5), and (7) (1982).

On direct appeal, the Tennessee Supreme Court summarized the evidence at trial:

---

[1] Petitioner's statement of the case is argumentative and commingles facts with personal opinions. Respondent thus submits the following statement of the case.

The victim of the homicide was Mrs. Carolyn Muncey, who lived with her husband and two young children on Ridgecrest Road in rural Union County, Tennessee. Mrs. Muncey was in her late twenties, and her children were about eight and ten years old at the time of her death on July 13, 1985.

In March 1985 appellant Paul Gregory House was released from prison in Utah and moved to the rural community in which the Muncey family lived. There he resided with his mother and stepfather for several weeks, but in June he moved into a trailer occupied by his girl friend, Donna Turner, which was located about two miles from the Muncey home. [House] did not own an automobile; but he was permitted to drive his mother's car from time to time, and he also drove Ms. Turner's car on some occasions.

Other than doing occasional farm work for his stepfather, [House] does not appear to have been regularly employed. He did not testify at trial at either the guilt phase or the sentencing hearing. He was shown to have had one prior conviction for aggravated sexual assault, a charge to which he pled guilty on March 16, 1981 in Salt Lake County, Utah. Apparently he was placed on parole in that state, and supervision of his parole was transferred to Tennessee when he returned to this state. He was approximately twenty-three years old at the time of the homicide in this case.

Mrs. Muncey disappeared from her home in the late evening of Saturday, July 13, 1985. Her badly beaten body was found on the following afternoon at about 3 p.m., lying partially concealed in a brush pile about 100 yards from her home.

Apparently the husband of the victim was not at home during the early part of the evening of July 13. Mrs. Muncey and her children visited a neighbor and left at about 9:30 p.m. to return to

their home. Later the older child, Laura [sic], awoke. She testified that she heard a voice which sounded like her grandfather making inquiry about her father. She also heard someone tell her mother that her father had been in a wreck near the creek. She heard her mother sobbing or crying as she left the house. When her mother did not return, the two children went to look for her at neighboring homes. Not finding her, they returned home and waited until their father arrived. Discovering that his wife was missing, he took the children back to the home of the neighbor where they had visited earlier in the evening and then called for members of his family to look for his wife.

When the body of Mrs. Muncey was discovered the next afternoon, she was dressed in her nightgown, housecoat and underclothing. Her body was badly bruised, and there were abrasions and blood giving every evidence that she had been in a fierce struggle. Apparently a severe blow to her left forehead had caused her death. It appeared, however, that she had also been partially strangled. A pathologist testified that the blow to her left forehead caused a concussion and hemorrhage to the right side of the brain from which she died, probably one to two hours after being struck. He testified that she probably would have been unconscious after having been struck. He estimated the time of her death at between 9 p.m. to 11 p.m. on Saturday, July 13, but emphasized that this was at best a rough estimate.

[House] never confessed to any part in the homicide, and the testimony linking him to it was circumstantial. There was evidence showing that he knew Mr. and Mrs. Muncey and had been with them socially on a few occasions. Through defense proof there was testimony that Mrs. Muncey and her husband had been having marital difficulties and that she had been contemplating leaving

him. There was no evidence to indicate that the appellant was aware of that situation, however, or that there had been any previous romantic or sexual relationship between him and the victim.

On the afternoon of Sunday, July 14, 1985, two witnesses saw [House] emerge from a creek bank at the side of Ridgecrest Road at the site where Mrs. Muncey's body was later found concealed in the underbrush. He was wiping his hands with a dark cloth and was walking toward a white Plymouth automobile, parked on the opposite side of the road, belonging to his girl friend Donna Turner. The two witnesses spoke briefly to [House], all of them discussing the fact that Mrs. Muncey had disappeared. Later the two witnesses became suspicious of what they had observed and returned to the point where they had seen [House] emerge from the embankment. Looking down the bank, they found the partially concealed body of Mrs. Muncey. They promptly notified the sheriff.

[House] later admitted that he had been in the area but denied that he had seen the body of Mrs. Muncey or had any knowledge of its presence. The dark rag which he had been using when first seen was never produced. It was the theory of the State, however, that this was a dark "tank top" or jersey which [House] was shown to have been wearing on the previous evening, July 13.

[House] gave two statements to investigating officers in which he denied being involved in the homicide. In both of these statements he stated that he had been at Ms. Turner's trailer the entire evening of July 13 and that he had not left until the next afternoon when he went to look for Hubert Muncey after learning of the disappearance of the latter's wife.

On Sunday afternoon various witness [sic] observed that [House] had numerous scratches and bruises on his arms, hands and body, there being an especially significant bruise on the knuckle of his right ring finger. [House] explained that these injuries had been sustained innocently earlier during the week, but when Ms. Turner was called as a witness, she said that she had not observed them prior to the evening of July 13. [House] also told investigators that he was wearing the same clothes on Sunday, July 14 as he had been wearing the previous evening. It was later discovered, however, that a pair of blue jeans which he had been wearing on the night of the murder was concealed in the bottom of the clothes hamper at Ms. Turner's trailer. These trousers were bloodstained, and scientific evidence revealed that the stains were human blood having characteristics consistent with the blood of Mrs. Muncey and inconsistent with [House's] own blood. Scientific tests also showed that fibers from these trousers were consistent with fibers found on the clothing of the victim. There were also found on her nightgown and underclothing some spots of semen stain from a male secretor of the same general type as appellant.

Some of the most damaging evidence against [House] was given by his girl friend, Ms. Turner. She at first told investigators that he had not left the trailer during the course of the evening of July 13. Later, however, she modified this testimony to state that he had been in the trailer until about 10:45 p.m. at which time he left to take a walk. She stated that he did not take her automobile. When he returned an hour or so later, he was panting, hot and exhausted. He was no longer wearing his blue jersey or his tennis shoes. The shoes were later found in an area different from the place where [House] told her he had lost them.

> [House] told Ms. Turner that he had thrown away the navy blue tank top because it had been torn when he was assaulted by some persons who tried to kill him. It was after [House's] return to the trailer that Ms. Turner first noticed the bruises and abrasions on his hands referred to previously.
>
> [House's] mother testified that he had not used her automobile on Saturday evening. She testified that during Saturday and Sunday she had been planning to separate from [House's] stepfather and that [House] had been assisting her in her preparations for moving.
>
> At the sentencing hearing the State proved [House's] prior conviction for aggravated sexual assault. [House's] parents testified that he came from a broken home and had been subjected to stress as a result of that experience. [House's] mother also testified that in the interval between the guilt trial and the sentencing hearing appellant had attempted suicide. She read into evidence a letter which he had written to her denying his involvement in the homicide. Apparently he had cut his wrists while in the jail awaiting the sentencing hearing, but the degree and extent of the injuries were not detailed in evidence. They do not appear to have been serious and did not prevent his attending the sentencing hearing.

State v. House, 743 S.W.2d 141, 142-44 (Tenn. 1987). (J.A. 130-35)

The Tennessee Supreme Court affirmed House's conviction and death sentence. (J.A. 145) After concluding that the evidence was sufficient to support both, the Court rejected House's numerous claims of trial error, save one. The Court determined that, in proving House's prior violent felony conviction at the sentencing hearing, the State should not have been permitted to elicit testimony disclosing the length of his sentence for the prior offense

and the fact that he was on parole at the time of the Muncey murder. The Court found the error to be harmless beyond a reasonable doubt, however, given the strength of the evidence establishing the three aggravating circumstances found by the jury, the "minimal proof of any mitigating factor," and "the fact that the State did not make any reference in closing argument to the length of [House's] prior sentence or to his parole status." (*Id.*)

II. State Post-Conviction Proceedings

In 1988, the state trial court denied House's first petition for post-conviction relief, in which he alleged, among several claims, that he had been denied the effective assistance of counsel at trial and sentencing. Following a hearing on the petition at which House elected not to introduce any proof other than the original trial transcript, the trial court denied post-conviction relief. On appeal, House raised only one claim – that an alleged error in the jury instructions at sentencing suggested that unanimity was required as to the existence of mitigating circumstances. House did not challenge the trial court's ruling on his ineffective assistance of counsel claim. The Tennessee Court of Criminal Appeals affirmed the judgment of the post-conviction court, and the Tennessee Supreme Court denied House's application for permission to appeal. *House v. State*, No. 28, 1989 WL 152742 (Tenn. Crim. App. Dec. 15, 1989) (app. denied Mar. 5, 1990). This Court denied certiorari. *House v. Tennessee*, 498 U.S. 912 (1990).

In 1990, House filed a second post-conviction petition, in which he once again asserted an ineffective assistance of counsel claim. The trial court summarily denied post-conviction relief, agreeing with the State that all of the grounds raised in the second petition had either been

previously determined in the first post-conviction proceeding or waived.[2] On appeal, the Tennessee Supreme Court affirmed, holding that "[t]he issue of ineffective assistance of counsel was . . . determined on the merits at the initial proceeding and the trial court did not err in dismissing this second post-conviction petition without a hearing." *House v. State*, 911 S.W.2d 704, 711 (Tenn. 1995). (J.A. 201) This court again denied certiorari. *House v. Tennessee*, 517 U.S. 1193 (1996).

III. Federal Habeas Corpus Proceedings

In September 1996, House filed a petition for habeas corpus relief under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Tennessee. On June 25, 1998, the district court granted summary judgment in favor of the State on the majority of House's 56 claims, concluding that the claims were either correctly decided by the state courts or had been procedurally defaulted. As to four remaining claims, the district court determined that they too were procedurally defaulted because House either had failed to raise them in the state post-conviction proceeding or had failed to appeal the post-conviction trial court's

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[2] Under Tennessee law in effect at the time of House's state post-conviction proceeding, the scope of a hearing in state post-conviction proceedings "extend[ed] to all grounds the petitioner may have, except those grounds which the court finds should be excluded because they have been waived or previously determined." Tenn. Code Ann. § 40-30-111 (1990) (repealed 1995). A ground for relief was held to be "previously determined" if a court of competent jurisdiction "has ruled on the merits after a full and fair hearing." Tenn. Code Ann. § 40-30-112(a) (1990) (repealed 1995). A ground for relief was "waived" if the petitioner "knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." Tenn. Code Ann. § 40-30-112(b)(1) (1990) (repealed 1995). By law effective May 10, 1995, the Post-Conviction Procedure Act was rewritten and replaced in its entirety by 1995 Tenn. Pub. Acts, ch. 207, § 1 (now codified at Tenn. Code Ann. § 40-30-101 *et seq.* (2003)).

decision rejecting them. The district court reserved judgment on these claims, however, pending an evidentiary hearing on actual innocence of both the offense and the death penalty and the related claims of ineffective assistance of cousel. (J.A. 315; U.S.D.Ct. Doc. Entry 161)

At the evidentiary hearing, House's proof of actual innocence focused on four primary areas.

DNA Evidence

House presented DNA evidence establishing that he was not the donor of the semen found on the housecoat and underwear Mrs. Muncey was wearing when her body was discovered. (Evid. Hearing Tr., 2/1/99, p. 84) The State did not contest this evidence. The victim's husband, Hubert "Little Hube" Muncey, Jr., testified at the hearing that he and his wife had sexual relations the morning before she disappeared. (Evid. Hearing Tr., 2/3/99, p. 54)

Hubert Muncey's "Confession"

House presented the testimony of Kathy Parker and Penny Letner, sisters who knew the Munceys. According to Parker and Letner, Hubert Muncey attended a party at Parker's home at or near the time of House's trial. Mr. Muncey, who had been drinking heavily, began to cry and said he did not mean to do it. He allegedly then stated that he and his wife were arguing over his failure to take her fishing, and he struck her, causing her to fall and hit her head. When he saw she was dead, he panicked and hid her body. (Evid. Hearing Tr., 2/1/99, pp. 28-29, 37-38) Letner stated that she had not told anyone about the confession because she was afraid and thought no one would listen to her. Parker claimed that she tried to tell authorities but that no one at the sheriff's department would listen to her. (*Id.* at 31) She did not seek to alert House's attorney, the news media, or even other family members concerning the confession. (*Id.* at 39, 44-45) Despite the fact that both women remembered that others were present during the

alleged confession, no one else ever came forward to report it either.

Lora Tharp, the victim's daughter, testified for the State at the evidentiary hearing that, on the night of the murder, she was in bed and heard a deep voice say that her father had been involved in a wreck. (J.A. 270) When she got up to look for her mother, she saw no signs that a fight had occurred in the house. She did not hear any arguments that night. (J.A. 272-73) Mr. Muncey, also called by the State, testified at the hearing that he did not kill his wife and had never told anyone that he had done so. (Evid. Hearing Tr., 2/3/99, pp. 46-48)

Bloodstain Evidence

House sought to explain the presence of the victim's blood on his blue jeans by theorizing that the blood had actually been poured or spilled on the jeans from a sample taken from the victim during her autopsy. At the evidentiary hearing, House presented the testimony of Dr. Cleland Blake, who opined, based upon a marker analysis study conducted by the FBI shortly after the crime, that the blood on the jeans came from the autopsy blood sample. (J.A. 252-53) He testified that it was the "incomplete penetration" of the GLO 1 enzyme in both the jeans sample and the autopsy blood sample, as noted in the marker study, that led him to this conclusion. He based his reading of the marker study on his assumption that the annotation "inc" contained in the report meant "incomplete penetration." (J.A. 254)

FBI Special Agent Paul Bigbee, an expert in forensic serology who prepared the report in question and conducted the marker analysis, testified for the State that the annotation "inc" in the report meant "inconclusive" and that he had not "the foggiest idea" what Dr. Blake meant by the term "incomplete penetration" as it related to serology. (J.A. 282) Paulette Sutton, an expert in blood stain pattern and blood spatter analysis, testified for the State that the bloodstains on the jeans were inconsistent

with blood having been spilled or poured, that several of the stains showed evidence indicating that the blood had been deposited on the jeans while they were being worn, and that some of the stains showed evidence of "clearing" that corresponded to the wrinkling effect one sees when someone is wearing pants and bends or squats, causing areas of the fabric to "accordion" slightly. (J.A. 294-96) Sutton also found that several of the bloodstains were mixed with mud and could not have resulted from spillage, because the blood and mud would have had to have been spilled at the same time. (J.A. 295)

House's Explanation

Although he had not testified at the criminal trial, House did testify at the evidentiary hearing and offered his own story of the relevant events.[3] According to House, on the night of the murder he went for a walk. He had been walking approximately twenty minutes when "two guys" drove up in a four-wheel-drive vehicle and, without provocation, grabbed him by the arm and assaulted him. House claimed that he hit them to get loose and then ran across the road and into the bushes. He heard at least one or two shots fired behind him as he ran. At some point while he was running, he lost one shoe and then threw the other one away when he returned to his girlfriend's trailer. It was also when he returned to his girlfriend's trailer that he discovered his shirt was missing. (Evid. Hearing, 2/3/99, pp. 104-06) He stated that he had not reported the assault to authorities because he was on parole and feared getting in trouble with his parole officer. (*Id.* at 108-09) House acknowledged that the day after Mrs. Muncey's

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[3] House was actually called as an adverse witness at the federal evidentiary hearing by the respondent. (Evid. Hearing Tr., 2/3/99, p. 86) However, on direct examination by his own counsel, House offered an account of his actions on the night of the murder. (Evid. Hearing Tr., 2/3/99, pp. 102-07)

disappearance he was on the road near the spot where the body was found. He maintained, however, that he was simply looking for Mr. Muncey after he learned that Mrs. Muncey was missing and that he had "missed" the Muncey driveway twice as he was driving. (*Id.* at 89-92) He denied killing Mrs. Muncey. (*Id.* at 107)

The District Court's Findings

The district court issued findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a) in a Memorandum Opinion filed February 16, 2000. (J.A. 314) The court made an express finding that the testimony of Parker and Letner concerning Mr. Muncey's alleged "confession" was not credible. (J.A. 348) Similarly, the district court rejected House's testimony: "The court considered Mr. House's demeanor and found that he was not a credible witness." (J.A. 329) In addition, after a lengthy analysis of the conflicting expert testimony concerning the blood evidence, the district court expressly determined that any "spillage [of the autopsy blood sample] occurred *after* the FBI crime laboratory received and tested the evidence." (J.A. 348) (emphasis added) The court further concluded that, "the fact that it was not [House's] semen on Mrs. Muncey's clothing does not negate the jury's finding that the murder was committed during the commission of kidnapping or during the attempted commission of rape or kidnapping." (J.A. 350) Based upon these findings, the district court concluded that House had failed to demonstrate his actual innocence and that House's remaining claims were therefore "barred on ground of procedural default." (J.A. 349) The court also rejected House's contention that he is "innocent of the death penalty." (J.A. 350) The district court denied habeas relief and also denied a certificate of appealability. (J.A. 350)

IV. Sixth Circuit Proceedings

In his application for a certificate of appealability to the Sixth Circuit, House specified only two issues for appeal: "[w]hether the District Court properly found that Mr. House had procedurally waived his ... claims by failing to present such claims and/or their factual basis to the state courts ...," and, second, "[w]hether the District Court erred in finding that Mr. House had not established entitlement to proceed on his claims of guilt phase error (e.g., ineffective assistance of counsel, *Brady/Giglio* violations, and police/prosecutorial misconduct) under the actual innocence exception to the procedural bar rule...." (Application for Certificate of Appealability, filed Sept. 15, 2000) Although the Sixth Circuit granted a certificate of appealability on "all claims in the petition," these are also the only two issues that House presented in his appellate briefs. House did not raise a substantive actual innocence claim – i.e., that his execution would violate the Eighth Amendment because of his actual innocence – in his application for a certificate of appealability or in any of the briefs he filed in the Sixth Circuit.

After briefing and argument, and by a vote of 2-1, a three-judge panel of the Sixth Circuit affirmed the judgment of the district court, concluding that "the case against ... [House] remains overwhelming" and that House had failed in his burden to demonstrate "that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *House v. Bell*, 283 F.3d 737, 2002 WL 370260 (6th Cir. 2002) (withdrawn from N.R.S. bound volume).

House filed a petition for rehearing en banc, which was rejected as untimely. Nevertheless, the Sixth Circuit sua sponte granted rehearing en banc upon the request of an unidentified member of the court. In an opinion issued

on November 22, 2002, and by a vote of 6-5, the en banc court decided to hold House's case in abeyance while it certified three questions to the Tennessee Supreme Court. (J.A. 370-71) The stated purpose of the certification order was "to ascertain whether there remains a 'state avenue open to process . . . [House's] claim' [of actual innocence] in this case." (J.A. 352) (quoting *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (O'Connor, J., concurring)).[4]

After the Tennessee Supreme Court declined to respond to the Sixth Circuit's questions, the case returned to the en banc court, and, in an 8-7 decision, the court again affirmed the judgment of the district court. The court first determined that federal habeas review of House's ineffective assistance claims was barred by an adequate and independent state-law ground. Having found House's ineffective assistance of counsel claims to be procedurally defaulted, the court then turned to his contention that his default should be excused because the failure to consider the merits of his claim would result in a fundamental miscarriage of justice, i.e., that a "constitutional violation has probably resulted in the conviction of one who is actually innocent of the crime" under *Schlup v. Delo*, 513 U.S. 298 (1995). Because the district court conducted an evidentiary hearing at which contested evidence was presented, the court of appeals examined both the evidence and the district court's related factual findings before concluding that House had failed to show that it is more likely than not that no reasonable juror would have convicted him. *Schlup*, 513 U.S. at 327. In performing that analysis, the court specifically deferred to the district court's resolution of credibility and factual disputes. *See Campbell v. Coyle*, 260 F.3d 531, 539 (6th Cir. 2001) ("We review the district court's conclusions of law in the application of [§ 2254] de novo, and its factual

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[4] The Warden unsuccessfully petitioned this Court for a writ of certiorari from the Sixth Circuit's certification order. *See Bell v. House*, 539 U.S. 937 (2003).

findings are reversed only if they are clearly erroneous."). (J.A. 426)

As to the focal points of House's proof, the court of appeals concluded: (1) the fact that the semen found on the victim's clothes came from her husband and not from House does not contradict the evidence that tends to demonstrate that he killed her after journeying to her home and luring her from her trailer; (2) the testimony of two women who allegedly heard Hubert Muncey's "confession" to the murder was not credible, nor was the content of the confession supported by any evidence in the Muncey home where the supposed altercation with the victim took place; (3) in contrast, the testimony of the victim's daughter, who was present in the home on the night of her mother's abduction and murder, was credible and consistent with her trial testimony; (4) the district court's finding that the "spillage [of the vials of blood] occurred after the FBI crime laboratory received and tested the evidence" was not clearly erroneous; and (5) House's theory that the blood on his blue jeans came from vials of blood gathered at Carolyn Muncey's autopsy and not from his physical attack in the course of her murder was based upon a speculative theory about enzyme degradation that was contradicted by other evidence in the record. The court of appeals specifically noted that the unchallenged testimony indicating that the bloodstains and mud on the petitioner's jeans were mixed supports the conclusion that House committed the murder. (J.A. 426-27)

The court further noted that the following facts implicating House remain undisputed:

> [House] lied to investigators about his whereabouts on the night of the murder; he gave inconsistent versions of the origins of the scratches and bruises on his hands and arms; he was seen near where the body was discovered on the day after the murder; he lied about what he was wearing on the night of the murder; blue jeans belonging to House, spattered with blood mixed

> with mud, were found at the bottom of Ms. Turner's laundry hamper; House has a deep voice and Laura [sic] Muncey testified that the man who came to the trailer on the night of the murder had a deep voice; and, according to Ms. Sutton [the State's blood spatter expert at the federal evidentiary hearing], the blood and mud found together on House's blue jeans had been mixed together, which "certainly eliminates the possibility of any stains being created by contamination in an evidence container."

(J.A. 426)

The court of appeals concluded that, "[d]espite his best efforts" in mounting a "concerted attack on his conviction," the "case against House remains strong." (J.A. 426, 428) "We therefore conclude that he has fallen short of showing, as he must, that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." (J.A. 428)

SUMMARY OF THE ARGUMENT

House argues that the Sixth Circuit's refusal to permit review of his procedurally defaulted claims was the result of a misapplication of the miscarriage of justice exception defined by this Court in *Schlup v. Delo*, 513 U.S. 298 (1995). He specifically contends that the Sixth Circuit failed to give "reliable, credible evidence of innocence the appropriate weight" in light of the evidence at trial and that the court improperly rejected his evidentiary submissions as insufficient to permit passage through the *Schlup* gateway "because some record evidence pointing to guilt remained." (Pet. Br. 27) Neither contention justifies relief; the first ignores both presumptively correct factual determinations of the state court and valid credibility determinations entrusted to the district court as trier of fact at the federal evidentiary hearing, and the second misapprehends the basis of the decision below. Moreover, both fail

to take into account the impact of AEDPA on this Court's procedural default jurisprudence.

House's sole evidentiary success at the federal evidentiary hearing – the production of DNA evidence excluding him as the source of semen found on the victim's nightgown – neither exculpates him of the murder nor undermines the body of the State's evidence upon which reasonable jurors convicted him at trial and would still convict. House's other evidence amounts to little more than collateral "cross-examination" of the State's trial evidence more than a decade after the fact in support of the defense theories presented to and rejected by petitioner's jury. None of this supplemental evidence materially undermines the strength of the State's case against him. Indeed, with the exception of the DNA evidence previously mentioned, petitioner's evidence of "innocence" was sharply contested in the federal evidentiary proceeding and is, for the most part, irreconcilable with undisputed evidence of House's guilt introduced at trial. Moreover, House's argument ignores the fact that the district court resolved against him all other material issues of fact that arose at the federal evidentiary hearing, and the Sixth Circuit properly deferred to the district court's factual and credibility determinations. In short, House's new evidence, viewed in light of the record as a whole, fails to establish that "no reasonable juror would have found [him] guilty" of first degree murder. *Schlup*, 513 U.S. at 329.

Moreover, the lower courts' gateway analysis in this case gave House the benefit of a far lower burden of proof than that imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA effectively overruled this Court's decision in *Schlup* and requires a petitioner seeking federal review of procedurally defaulted claims to present "clear and convincing" evidence of factual innocence. Since House's evidence is manifestly insufficient to pass through the "miscarriage of justice"

gateway as defined in *Schlup*, it cannot satisfy the higher standard set by AEDPA.

House's effort to resurrect a substantive innocence claim before this Court is even less availing. First, the issue is not properly before the Court since House presented only a gateway innocence claim in the Sixth Circuit, which limited its decision to that issue. Second, even if he had presented such a claim, the Sixth Circuit would have had no alternative but to reject it under this Court's decision in *Herrera v. Collins*, 506 U.S. 390 (1993), which does not authorize freestanding claims of "actual innocence" by state prisoners in federal habeas proceedings, when, as here, there are state avenues available to process such claims. But even if he could overcome both of these hurdles, his case does not even approach the "truly persuasive demonstration of 'actual innocence'" that this Court hypothesized in *Herrera* might warrant habeas relief.

ARGUMENT

I. HOUSE FAILED TO DEMONSTRATE THAT A FUNDAMENTAL MISCARRIAGE OF JUSTICE WOULD RESULT ABSENT FEDERAL REVIEW OF HIS PROCEDURALLY DEFAULTED CLAIMS.

House challenges the decision of both courts below that the evidence he presented at the federal evidentiary hearing failed to establish that he was innocent of first-degree murder so as to permit review of his procedurally defaulted claims. Both courts reached their decisions by applying the standard of proof announced in *Schlup v. Delo*, 513 U.S. 298 (1995), a case predating Congress's enactment of AEDPA. But House's case, initiated in September 1996, is controlled by AEDPA (J.A. 395), which significantly altered habeas jurisprudence, including the

"miscarriage of justice" exception.[5] While the decision below is fully justified under *Schlup*, AEDPA should be read to impose a more exacting burden on habeas petitioners to overcome state-court defaults.

A. AEDPA Should Be Construed To Elevate the Burden of Proof Required To Excuse a Petitioner's Procedural Default to "Clear and Convincing Evidence."

In *Schlup*, this Court re-affirmed the long-standing principle that a federal court may not consider claims raised in a second or subsequent habeas petition unless the petitioner demonstrates either (1) cause for the failure to raise the claim in his or her initial petition and actual prejudice or (2) that a fundamental miscarriage of justice will result unless the court considers the petitioner's claims.[6] *Schlup*, 513 U.S. at 863. Where a petitioner is unable to establish cause and prejudice sufficient to excuse his failure to present new evidence in support of his first habeas petition, he must demonstrate that his case falls within the "narrow class of cases . . . implicating a fundamental miscarriage of justice," *Schlup*, 513 U.S. at 314-15 (quoting *McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991)), an exception that this Court has explicitly tied to the petitioner's factual innocence. *Id.* at 321.[7] *Schlup* defined this "actual innocence" exception in the context of abusive

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[5] Respondent presented this argument in the Sixth Circuit (Supplemental Brief of Respondent, pp. 12-18), but the court rested its decision on House's failure to meet the standard under *Schlup*.

[6] Such petitions may include either "successive" claims, which are identical to claims raised and rejected on the merits in a prior petition, or "abusive" claims, which were available but not relied upon in a prior petition. *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n.6 (1986).

[7] *See also Kuhlmann*, 477 U.S. at 454 (miscarriage of justice may allow successive claims to be heard); *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("actual innocence" exception applies to procedurally defaulted claims).

or successive petitions, holding that a petitioner who cannot demonstrate cause and prejudice "must show that it is more likely than not that no reasonable juror would have convicted him." *Schlup*, 513 U.S. at 332 (O'Connor, J., concurring). En route to that conclusion, the Court rejected the more stringent "clear and convincing" standard set forth in *Sawyer v. Whitley*, 505 U.S. 333 (1992), in which the petitioner claimed "innocence of the death penalty," in favor of the less demanding "more likely than not" standard set forth in *Carrier*, a case involving a procedurally defaulted claim. *Schlup*, 513 U.S. at 326-27.

In 1996, Congress overruled *Schlup* when it enacted AEDPA. Among its substantial habeas reform provisions, AEDPA completely eliminated the authority of federal courts to entertain successive habeas petitions under § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."). As to abusive claims (i.e., those available but not relied upon in a prior petition), AEDPA prohibited review of claims based on new evidence unless the petitioner demonstrates both (1) due diligence in the discovery of the factual predicate and (2) that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish *by clear and convincing evidence* that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2) (emphasis added). AEDPA also imposed nearly identical requirements on a habeas petitioner seeking to obtain an evidentiary hearing where the petitioner failed to develop the factual basis of a constitutional claim in state court.[8] 28 U.S.C. § 2254(e)(2).

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[8] In so doing, AEDPA also superseded *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), by requiring that petitioners satisfy § 2254(e)(2)'s provisions rather than *Keeney*'s cause-and-prejudice standard. *Williams v. Taylor*, 529 U.S. 420, 433 (2000).

Congress's explicit codification of the standard previously rejected in *Schlup* evidences legislative intent to supersede *Schlup*'s holding.[9] *See also Doe v. Menefee*, 391 F.3d 147, 161 (2nd Cir. 2004) (acknowledging AEDPA's "modification" of "actual innocence" doctrine as it applies to successive petitions and undeveloped claims); *Jaramillo v. Stewart*, 340 F.3d 877, 881 (9th Cir. 2003) (questioning whether *Schlup* "more likely than not" standard applies to post-AEDPA petitioner); *Hope v. United States*, 108 F.3d 119, 120 (7th Cir. 1997) (concluding that the "actual innocence" exception, permitting revival of a defaulted sentencing issue by way of a successive application for relief, does not survive AEDPA); *Diamen v. United States*, 725 A.2d 501, 525 n.23 (D.C. App. 1997) (noting AEDPA's statutory modifications of *Schlup* standard). Because of the statutory nature of the remedy itself, Congress's authority to formulate the standard – and further restrict the availability of habeas relief to state prisoners – is broad. *See Schlup*, 513 U.S. at 343 (Scalia, J., dissenting) ("Within the very broad limits set by the Suspension Clause, the federal writ of habeas corpus is governed by statute.").[10]

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[9] *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here ... Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). Congress was fully aware when it passed AEDPA's habeas reform provisions that incorporation of the "clear and convincing" standard was tantamount to overruling the probability standard of *Schlup* and *Carrier*. Oh, *The Gateway for Successive Habeas Petitions: An Argument for* Schlup v. Delo's *Probability Standard for Actual Innocence Claims*, 19 Cardozo L. Rev. 2341, 2351-54 (1998). Indeed, a proposed amendment specifically designed to align AEDPA with those decisions was tabled in the Senate by a vote of 62 to 37. Martin, *The Comprehensive Terrorism Prevention Act of 1995*, 20 Seton Hall Legis. J. 201, 237-39 (1996).

[10] *See also Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("The added restrictions which [AEDPA] places on successive habeas petitions are well within the compass of th[e] evolutionary process [of the federal

(Continued on following page)

Although the federal habeas statute does not specifically address procedural default of claims, in light of the changes wrought by AEDPA in the areas of successive, abusive and undeveloped claims, it makes little sense to maintain a remnant of habeas jurisprudence for procedurally defaulted claims that has now become obsolete in these other contexts. First, *Schlup* itself recognized that the "doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas review." *Schlup*, 513 U.S. at 863 (quoting *McCleskey*, 499 U.S. at 490-91). Significant state interests – "in channeling the resolution of claims to the most appropriate forum, in finality, and in having an opportunity to correct its own errors" – are implicated by procedural defaults in all their various forms. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Given the similarity in the interests at stake, this Court has found it "irrational to distinguish" among the various forms of default and has sought to harmonize the standards applicable to each in the various default contexts. *Keeney*, 504 U.S. at 7-8.[11] As this Court recognized in *Keeney*, "[t]here is no good reason to maintain in one area of habeas law a standard that has been rejected in the area in which it was principally enunciated." *Id.* at 10.

Furthermore, application of a lower gateway standard for procedurally defaulted claims leads to the anomalous result that a petitioner may pass through the gateway

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habeas statute]."); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) ("[T]he power to award the writ by any of the courts of the United States [] must be given by written law.").

[11] For example, in *Coleman*, the Court held that the same cause-and-prejudice standard applicable to the failure to raise a particular claim should apply as well to the failure to appeal at all. 501 U.S. at 750. And, in *Keeney*, the Court rejected the "deliberate bypass" exception in *Fay v. Noia*, 372 U.S. 391 (1963), for federal evidentiary hearings where material facts had not been developed adequately in state court in favor of the cause-and-prejudice standard uniformly applied to other state procedural defaults.

only to hit a brick wall on the other side. Under AEDPA's evidentiary hearing provisions, when a petitioner has "failed to develop" the factual basis of a constitutional claim in state court, § 2254(e)(2) prohibits a federal evidentiary hearing unless he can satisfy § 2254(e)(2)'s two-part test, which includes a "clear and convincing" showing that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[12] Thus, a petitioner may pass through the *Schlup* gateway but still be barred from developing the factual basis of the defaulted claim. A pure question of law would receive federal review, but a so-called "mixed" question of law and fact requiring additional evidentiary proceedings would not.[13] Retention of *Schlup* for defaulted claims creates a nearly identical problem to the one this Court attempted to rectify in *Keeney* – a higher burden imposed on prisoners who fail in state court to develop a federal

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[12] In *Williams v. Taylor*, 529 U.S. 420 (2000), this Court interpreted § 2254(e)(2) as indicating congressional intent to "raise the bar" on defaulting state prisoners. *Williams*, 529 U.S. at 433.

[13] That is precisely the result in this case. Because House "failed to develop" the factual basis of the ineffective assistance claim in his first post-conviction proceeding, choosing instead to rely solely on the trial transcript to support his claim and then not appealing the post-conviction court's disposition of that claim, he is now barred from developing additional facts unless he can satisfy § 2254(e)(2). Thus, even if he could pass through the *Schlup* gateway, he is statutorily barred from developing the factual basis of his claim absent a "clear and convincing" showing of innocence. Moreover, because the state court actually adjudicated House's ineffective assistance claim in his first post-conviction proceeding, federal review is further circumscribed by § 2254(d), which limits the scope of review to evidence before the state court at the time of its decision. *See, e.g., Holland v. Jackson*, 542 U.S. 649, 652 (2004) ("[W]hether a state court's decision was unreasonable must be assessed in light of the record the court had before it."); *Williams v. Taylor*, 529 U.S. 362, 394-96 (2000) (assessing the reasonableness of the Virginia Supreme Court's decision under *Strickland v. Washington*, 466 U.S. 668 (1984), in light of evidence presented in the Virginia trial court).

claim properly than on those who never raise a claim at all.[14]

Schlup's "actual innocence" standard also runs afoul of the presumption of correctness that must be accorded under AEDPA to state-court factual determinations. The *Schlup* analysis hinges upon a petitioner's ability to produce evidence that calls into question a factual determination made by a state court. But AEDPA cloaks the state-court determination of factual guilt, along with underlying factfindings essential to that determination, with a presumption of correctness under 28 U.S.C. § 2254(e)(1), which may be overcome only by clear and convincing evidence. Because the standard of proof in *Schlup* is irreconcilable with § 2254(e)(1), it must necessarily yield to the heightened "clear and convincing" standard mandated by AEDPA.

In sum, by enacting the habeas reform provisions of AEDPA, Congress deliberately altered the balance struck by this Court in *Carrier* and *Schlup* in favor of the interests of comity, finality and federalism. This Court's habeas cases cannot logically be read to allow a distinction between the standards governing procedural default of claims and other forms of default. Because it is "irrational" in theory and unworkable in practice to distinguish between the various forms of procedural default, this Court should clarify that AEDPA raised petitioner's burden of proof for gateway claims of "actual innocence" to clear and convincing evidence and engrafted a due diligence requirement onto such claims for petitioners seeking to overcome procedural default. *See* 28 U.S.C. §§ 2244(b)(2), 2254(e)(2).

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[14] *See also Carrier*, 477 U.S. at 492 (congruence between standards for appellate and trial default reflects judgment that concerns for finality and comity are virtually identical regardless of the timing of the procedural default).

House's evidence plainly flunks that test. In the first place, with the exception of the DNA analysis upon which he relies, all of House's "new" evidence was either available at the time of his state court trial or could have been discovered through the exercise of due diligence. Moreover, as we now show, House's evidence hardly makes out a clearly and convincing case of innocence. Indeed, it even falls far short of the *Schlup* standard.

B. House Failed To Present Evidence Sufficient To Pass Through the "Actual Innocence" Gateway As Defined in *Schlup*, Let Alone Clear and Convincing Evidence of His Innocence.

Even under *Schlup*, House presented insufficient evidence to pass through the "actual innocence" gateway. In fact, the evidence and arguments presented in the district court are of the type that juries hear and reject every day in criminal courts across the country – attempts to undermine expert testimony by challenging the handling of physical evidence, attempts to discredit witnesses by challenging their perception of events, and even providing the jury with a viable alternative suspect.[15] But House must do more than simply devise a potentially successful defense strategy. He must show that his case falls within that "extraordinary" class of cases in which "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Carrier*, 477 U.S. at 496. To establish the requisite probability under *Schlup*, he was required to demonstrate "that it is more likely than not that *no reasonable juror* would have convicted him [i.e., found him guilty beyond a reasonable doubt] in light of the new evidence." *Schlup*, 513 U.S. at 327 (emphasis added). A claim of actual innocence under *Schlup* must be supported

[15] Indeed, each of these strategies was actually employed at House's own criminal trial.

with "new *reliable* evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Id.* at 324 (emphasis added).

House argues that the evidence presented in the district court meets that standard and justifies review of his defaulted claims. But his argument ignores virtually all of the district court's factual and credibility determinations and thus empties *Schlup*'s "reliability" requirement of any meaning. Moreover, in order to conclude that House's evidence establishes that he is actually innocent, one would have to (1) disbelieve the State's witnesses concerning the circumstances and timing of events leading up to and immediately following Carolyn Muncey's abduction, including Lora Tharp's testimony concerning the perpetrator's voice and the words used to lure her mother away from the safety of her home and small children late at night; (2) believe House's version of events, even though he is an admitted liar, while ignoring inconsistencies in his statements to police and rejecting as "coincidence" his presence the following morning near where the body was hidden; (3) believe Hubert Muncey's drunken confession – purportedly proclaimed at a party some fourteen years before the federal evidentiary hearing – despite the absence of any evidence corroborating that account of the crime and his sworn denial of ever having made such a confession; (4) believe that local law enforcement personnel and the Tennessee Bureau of Investigation (TBI) engaged in an elaborate conspiracy to frame House by altering physical evidence to an extent undetectable by an FBI serological expert at trial and a blood spatter expert today, all because he "wasn't from around there"; and (5) reject the testimony of three expert witnesses who discounted House's various attempts to explain away the victim's blood on his pants. That twelve out of twelve reasonable jurors would accept this scenario and actually acquit House of murder is not only improbable, it is virtually impossible.

Schlup's reliability component requires the habeas court to determine whether the new evidence is trustworthy by considering it both on its own merits and, where appropriate, in light of the pre-existing evidence in the record. 513 U.S. at 327-28. Once it is determined that the new evidence is reliable, *Schlup* requires the habeas court to consider a petitioner's claim in light of the evidence in the record as a whole. *Id.* Only then is the court able to conclude whether new evidence truly throws the petitioner's conviction into doubt such that "no reasonable juror would have found petitioner guilty beyond a reasonable doubt."[16] *Id.* Where evidence is sharply contested, as in this case, a district court's factual determinations are critical to determining whether a petitioner has met his burden under *Schlup*.

In *Doe v. Menefee*, 391 F.3d 147 (2d Cir. 2004), the Second Circuit accurately described the *Schlup* analysis as a "hybrid structure," requiring the habeas court to make

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[16] Although *Schlup*'s preponderance standard is significantly lower than the *Sawyer* "clear and convincing" standard, the "no reasonable juror" requirement still imposes a substantial burden on petitioners seeking to excuse default on the ground that they are "entirely innocent." *Schlup*, 513 U.S. at 324-25. As the Second Circuit recently explained, "even if the [habeas] court, as one reasonable factfinder, would vote to acquit, the court must step back and consider whether the petitioner's evidentiary showing most likely places a finding of guilt beyond a reasonable doubt outside the range of potential conclusions that any reasonable juror would reach." *Doe v. Menefee*, 391 F.3d 147, 173 (2d Cir. 2004). *See also Carriger v. Stewart*, 132 F.3d 463, 484-85 (9th Cir. 1997) (Kozinski, dissenting) ("This compact phrase formulates a daunting standard: We must imagine twelve reasonable jurors hearing the original case against the petitioner, as augmented by the new evidence. For a petitioner to pass through the *Schlup* gateway, he must persuade us that every imaginary juror, twelve out of twelve, would vote to acquit him of any involvement in the killing."); *House v. Bell*, 311 F.3d 767 (6th Cir. 2002) (Boggs, dissenting) ("For petitioner to fail to meet the *Schlup* standard, we need only assess that one of those potential jurors has a 50+% likelihood of convicting, considering all the new evidence."). (J.A. 381)

its own credibility determinations as to both the new evidence and evidence in the record that may be thrown into doubt by the new material and then make a probabilistic determination about what reasonable jurors would do. *Doe*, 391 F.3d at 163. The latter inquiry is necessarily dependent upon the first. *See, e.g., Schlup*, 513 U.S. at 332 ("[T]he court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence."). Where, as in this case, the habeas court determines that the new evidence is not sufficiently reliable in itself or in light of other record evidence unaffected by the proffer, the court is justified in concluding that the petitioner has failed to demonstrate, as he must, that the criminal justice process has reached the wrong factual result.[17]

House's "case for innocence" rests on four pillars – DNA evidence excluding him as the source of semen found on the victim's nightgown, expert testimony attempting to establish that blood found on House's pants was deposited there after the murder and not in the course of it, testimonial accounts of a drunken confession by the victim's husband, and House's version of events on the night of the murder and the following morning. But his foundation crumbles in light of other record evidence and the district court's factual and credibility findings.

1. The Semen Evidence Does Not Exculpate House.

House contends that DNA evidence, which established that semen on the victim's nightgown and underwear was deposited by her husband and not by House, disproved the

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[17] "[A] petitioner does not pass through the gateway ... if the district court believes it more likely than not that there is *any juror* who, acting reasonably, would have found the petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. 333 (O'Connor, J., concurring) (emphasis added).

only motive offered by the prosecution for the commission of the offense – the intent to rape the victim – and thus removed "the central basis for his conviction." (Pet. Br. 39) But, since neither sexual contact nor motive are elements of first degree murder under Tennessee law, this evidence cannot be said to undermine House's conviction. Moreover, House grossly overstates the degree to which the State relied on the semen evidence to support its case. Indeed, the prosecutor did not mention the semen evidence in his principal arguments to the jury at trial or even suggest a possible motive for commission of the offense. Defense counsel, on the other hand, forcefully argued that the State was unable to exclude Hubert Muncey as the source of the semen, a fact that was undisputed at trial.[18] (Trial Tr. 1272-73)

The State never contended at trial that House raped the victim or even that the semen found on Mrs. Muncey's nightgown could only have come from the petitioner. To

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[18] Defense counsel also identified as a weakness in the State's case the absence of any apparent motive for the commission of the offense. (Trial Tr. 1274) In response, the prosecutor downplayed the necessity for such a showing: "The law says that if you take another person's life, you beat them, you strangle them, and then you don't succeed, and then you kill them by giving them multiple blows to the head, and one massive blow to the head, and that causes their brains to crash against the other side of their skull, and caused such severe bleeding inside the skull itself, that you die – that it does not make a difference under God's heaven what the motive was. That is what the law is. The law is that if motive is shown, it can be considered by the jury as evidence of guilt. But the law is that if you prove that a killing was done, beyond a reasonable doubt, by a person, and that he premeditated it, he planned it, it is not necessary for the jury to conclude why he did it. . . . *But motive is not an element of the crime. It is something that you can consider, or ignore. Whatever you prefer. The issue is not motive. The issue is premeditation.*" (Trial Tr. 1302-03) In any event, the remaining evidence at trial – including the timing and circumstances of the abduction, bruising on the victim's thighs, and the presence of blood on the *inside* of House's jeans near the button – is more than sufficient to support an inference that House acted with a sexual motive.

the contrary, on direct examination by the State at petitioner's criminal trial, FBI Special Agent Bigbee testified that, based upon the physical characteristics of the semen stain, the semen on Mrs. Muncey's nightgown and panties *could have been deposited* by her husband, who was, even then, an alternative suspect under the defense theory. (Trial Tr. 655-68) Contrary to House's characterization, motive was by no means the "central basis" of the State's case.[19] Thus, while it is likely that no reasonable juror would have viewed the semen as linking petitioner to the crime in light of the current DNA analysis of the evidence, the DNA analysis does not establish that no reasonable juror would have convicted him.

2. House's Theory about the Origin of Blood on His Jeans Is Speculative and Contradicted by Expert Testimony.

Recognizing that his blood-stained blue jeans were the most compelling physical evidence presented by the State at trial linking him to the crime, House mounted a concerted attack on every aspect of the handling and testing of the evidence.[20] He argued first that vials of blood obtained from the autopsy accidentally spilled en route to the FBI laboratory while being transported in the same

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[19] In addition, House's jury was instructed as to the State's burden of proving the essential elements of first degree murder beyond a reasonable doubt. (Trial Tr. 1319-20) In analyzing "actual innocence" under *Schlup*, a "reasonable" juror will presumably consider fairly all of the evidence presented in the case and will follow the court's instructions to require proof beyond a reasonable doubt. *Schlup*, 513 U.S. at 329.

[20] DNA testing in the federal habeas proceeding confirmed that the donor of the blood on House's jeans "can not be excluded as the biological mother of Lora Ann Tharp." (Evid. Hearing, 2/3/99, p. 110 and Resp. Exh. 6) DNA testing excluded House as the source of the bloodstains on the jeans. (*Id.* at Resp. Exh. 7) Indeed, House does not dispute that it is Carolyn Muncey's blood on his jeans.

evidence container as the blue jeans; then, when that theory was debunked, House argued that local law enforcement authorities, in concert with the TBI, intentionally placed the blood on the jeans in an attempt to frame him, apparently because he "wasn't from around there." Both theories cannot be correct, and to accept either would require that every reasonable juror ignore or discount the testimony of at least two expert witnesses and multiple lay witnesses.

House's "accidental spillage" theory would require that every juror reject outright the testimony of both FBI Agent Bigbee and Paulette Sutton, an expert in bloodstain pattern and stain analysis. Agent Bigbee testified that there was no leakage in the items submitted to him for testing prior to trial. Had there been any indication of contamination, the evidence would have been returned without examination pursuant to FBI policy.[21] (Evid. Hearing Tr., 2/3/99, pp. 134-35) Paulette Sutton testified that the bloodstain patterns on House's jeans were essentially of two types – spatter and transfer – and were inconsistent with blood having been spilled or poured onto the jeans. (*Id.* at 185-86) In addition, Sutton observed transfer stains *inside* the pocket of House's jeans, which would suggest that the staining occurred by placing a bloody hand or other object into the pocket. She also observed stains on the *inside* of the jeans beside the button closure. (*Id.* at 183-84)

House's elaborate conspiracy theory requires an even greater leap. Reasonable jurors would have to discredit nearly every law enforcement official who handled the

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[21] Agent Bigbee testified that, "[i]f there is any indication that the evidence is contaminated in any manner, if there is spillage or leakage, for example, or a broken liquid vial, or any other indication of any kind that it is cross-contaminated, it will not be examined and it will be sent back to the contributor." When asked whether there was any leakage of the blood specimen tubes submitted in this case, Bigbee replied, "No, there was not." (Evid. Hearing Tr., 2/3/99, pp. 134-35)

bloody jeans between Donna Turner's trailer and the FBI laboratory, as well as Agent Bigbee's explanation of the meaning and significance of abbreviations contained in his own enzyme marker study.[22] Moreover, under the evidence in this case, to accomplish the feat House theorizes would be nothing short of fantastic. Paulette Sutton offered uncontested testimony that the staining pattern on House's jeans indicated that blood got onto the jeans while they were being worn. Thus, to prevail under *Schlup*, House would have to convince twelve reasonable jurors that, after the victim's blood samples were obtained during the autopsy and the evidence was packaged, some number of law enforement officials reopened the sealed evidence containers and intentionally placed the blood on House's jeans. Since it is clear from Sutton's testimony that the blood was not simply poured or spilled, one of the officers would have had to don House's jeans while another splattered and wiped blood on both the inside and outside of the jeans. The officer would then have had to remove the jeans and repackage them for transport.[23] Not only is this

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[22] House's theory hinges on the testimony of defense expert Dr. Cleland Blake, who opined that, based on the enzyme marker study conducted by Agent Bigbee, the blood on House's jeans had to have come from the vial of autopsy blood rather than from the assault on Mrs. Muncey. (J.A. 252-53) But his opinion was based entirely upon an erroneous interpretation of an abbreviation contained in the report. Dr. Blake assumed that the annotation "inc" found on the report stood for "incomplete penetrance." (J.A. 255-56) In fact, "inc" stands for "inconclusive," according to Agent Bigbee, who conducted the testing and prepared the report in question. (J.A. 282) Agent Bigbee also specifically disputed Dr. Blake's conclusion that the liquid blood specimen from the victim's autopsy and the cuttings from the petitioner's pants were from the same sample. (J.A. 283)

[23] Of course, TBI Agent Scott would have to agree to lie about the condition of the jeans when he seized them from Donna Turner's trailer so that he could claim that the stains existed at the time he first saw them. Moreover, House's eleventh-hour attempt to discredit Scott's testimony by suggesting that the bloodstains on his jeans could only be seen through a miscroscope (Pet. Br. 25 n.13) is not supported by the

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scenario not "reasonable," it stretches credulity to the breaking point. While it may be remotely possible that some juror would accept one or the other theory, it is simply not possible that *every* juror would do so. Instead, it is far more likely for the principle of Occam's razor to prevail – that the simplest explanation is the best.[24] And in this case, the simplest explanation, the one most consistent with the body of evidence in the case, and the one advanced by the State, is that the victim's blood was splattered and wiped on House's pants during the course of and immediately following his murderous acts. While there is no doubt that spillage of the blood occurred at some point (House's own expert noted as much when he received the evidence for testing prior to trial), the district court found as a fact that it happened "*after* the FBI crime laboratory received and tested the evidence," a finding uncontradicted by any direct evidence. (J.A. 348) (emphasis added) As the Sixth Circuit recognized, appellate review of the district court's findings of fact is made under the clearly erroneous standard. (J.A. 426) *See also* Fed. R. Civ. P. 52(a) ("Findings of fact [by the district court], whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."); *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985) (reviewing court oversteps its bounds under Rule 52(a) if it undertakes to duplicate

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record. Paulette Sutton testified in the federal proceedings that, although it is "very hard to see the color [of the stains], specially [sic] after this amount of time," the bloodstains were "dark" and would have been "suspicious." (Evid. Hearing, 2/3/99, pp. 218-19)

[24] Occam's razor (also Ockham's razor): "A rule in science and philosophy stating that entities should not be multiplied needlessly, which is interpreted to mean that the simplest of two or more competing theories is preferable and that an explanation for unknown phenomena should first be attempted in terms of what is already known. [After William of Ockham (1285?-1349)]." The American Heritage Dictionary, 860 (2nd College ed. 1985).

the role of lower court). Where "the district court's account of the evidence is plausible in light of the record viewed in its entirety," clear-error review permits only limited reexamination of factual findings. *Anderson*, 470 U.S. at 573-74. The district court's assessment of the evidence here is not only plausible, it is fully supported by uncontradicted expert testimony.

House's speculative scientific theory in support of an implication of an elaborate conspiracy to frame him is based almost entirely upon an incorrect interpretation of an abbreviation in a scientific report prepared for his original trial. His spillage theory was debunked almost from the start. As Judge Boggs observed below, House cannot prevail under *Schlup* because "some jurors would likely believe the direct testimony and evidence in preference to a disputed scenario requiring perjurious cooperation of numerous government officials." (J.A. 379)

3. Hubert Muncey's Drunken "Confession" Lacks Evidentiary Corroboration, Is Inconsistent with Undisputed Evidence in the Record, and Is Directly Contradicted by Expert Testimony.

House attempts to buttress his case by reviving a theory previously rejected by the jury at trial – that Hubert Muncey, Jr., had both a motive and an opportunity to murder his wife. To do so, he turns to the eleventh-hour testimony of local witnesses regarding an alleged drunken confession and attempts to create an alibi for the night of the murder. Kathy Parker and Penny Letner, two sisters who knew the Munceys, testified that Mr. Muncey attended a party at Ms. Parker's home during the period following the murder. Both women testified that Mr. Muncey had been drinking heavily, began to cry, and then

confessed to killing his wife.[25] Despite the fact that, under either woman's rendition, several other people were apparently present when this "confession" occurred, no one else ever came forward to report it.[26] Artie Lawson testified that, on the morning after the murder, Mr. Muncey came to her house and requested that, if asked, she say that he [Muncey] had been at the dance that Saturday night. (Evid. Hearing Tr., 2/1/99, p. 22)

As to Muncey's alleged "confession," given their fourteen-year delay in coming forward, the district court understandably, and rightfully, viewed the testimony of Parker and Letner with skepticism. *See Schlup*, 513 U.S. at 332 (on remand for application of *Schlup* standard, district court may consider how the timing of affidavits bears on the probable reliability of the evidence). But the time between the alleged confession and the testimony was not the sole factor in the district court's finding that these witnesses were not credible. The court also viewed the substance of their testimony in light of other evidence presented at trial and the federal evidentiary hearing, noting particularly the absence of any physical evidence in

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[25] Muncey allegedly stated that he and his wife were arguing over his failure to take her fishing and that he hit her, causing her to fall and hit her head. When he saw that she was dead, he panicked and hid her body. (J.A. 232-33)

[26] Mary Atkins also testified at the evidentiary hearing that, on the night in question, she saw Carolyn and Hubert Muncey arguing in the parking lot of the dance and that Mr. Muncey "backhanded" his wife. (Evid. Hearing, 2/1/99, p. 13) After that, according to Atkins, Carolyn Muncey left the dance on foot. (*Id.* at 14) But no other witness testified that Carolyn Muncey was present at the dance on July 13, 1985. Moreover, at trial, Pamela Luttrell, a neighbor of the Munceys, testified that she had seen Carolyn Muncey several times during the course of that day, and that Mrs. Muncey and the children visited in the Luttrell home from 8:00 p.m. to approximately 9:30 p.m. on Saturday night. (Trial Tr. 633-34) Luttrell testified that, as she was leaving, Mrs. Muncey stated she was going home to "feed the younguns." (Trial Tr. 634) The autopsy results indicated that Mrs. Muncey died within an hour to an hour and a half after eating her evening meal. (Trial Tr. 996)

the Muncey home to corroborate the substance of Hubert Muncey's alleged "confession,"[27] as well as the testimony of Lora Muncey Tharp that she neither heard nor saw any signs of a struggle or argument on the night of her mother's murder.[28] (J.A. 348) *See Anderson*, 470 U.S. at 575 (even where a witness appears to be telling the truth, the court must evaluate the testimony in light of other evidence, corroboration or lack thereof, internal inconsistency, and any inferences or assumptions that crediting particular testimony would require). The extensive traumatic injuries sustained by Carolyn Muncey in the course of her murder are also inconsistent with Muncey's alleged confession.[29] As to Muncey's alleged attempt to create an

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[27] Dennis Wallace, the Luttrell Chief of Police, responded to the missing persons report made by Hubert Muncey in the early morning hours of July 14, 1985. Wallace testified that he looked around the inside of the Muncey house that night and saw nothing out of order — no furniture knocked over or shoved out of place or any blood that he could detect. (Evid. Hearing Tr., 2/1/99, p. 59) The district court also assessed the testimony of Hubert Muncey himself, who denied making the statement related by Parker and Letner and who testified, subject to cross-examination by petitioner's counsel, concerning his whereabouts on the night of the murder. (J.A. 323-25)

[28] Lora Tharp testified in the federal hearing that the Muncey children usually went to bed around 9:00 or 9:30 p.m. After she had gone to bed on the night of the murder, she "heard a voice saying my dad had a wreck down next to the creek. . . . It was a deep voice that sounded like my papaw, but he was at home." At some point afterward, she and her brother got up to look for their mother in the trailer and outside. Mrs. Tharp heard no arguments between her parents that night. (Evid. Hearing, 2/3/99, pp. 32-35) Similarly, at trial, Lora Muncey, then ten years old, testified that she heard her mother upset and crying when someone "said that daddy had a wreck down the road . . . down next to the creek." (J.A. 19) A short time later, she and her brother went to look for her mother. Not finding her, they returned home and went back to bed. (J.A. 19-20)

[29] Officer Lanny Janeway of the Maynardville Police Department described the condition of Mrs. Muncey's body at the crime scene: "The face and head area . . . appeared bruised, badly bruised. There was dried blood coming from the nose and ears. . . . There was scratches and

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alibi, the district court found that Artie Lawson's testimony at the evidentiary hearing was inconsistent with an affidavit Lawson previously submitted to the court in response to the Warden's motion for summary judgment.[30] (J.A. 319)

Credibility determinations under Rule 52(a) "demand[] even greater deference to the trial court's" factual findings. *Id.* The Sixth Circuit's decision demonstrates the proper regard by an appellate court for the credibility determinations made by a district judge. (J.A. 425) House would have this Court disregard those findings without any basis in the record for doing so.

4. House's Account of His Actions on the Night of the Murder and the Following Morning Is Implausible and Was Properly Rejected out of Hand by the District Court.

Finally, House's testimony adds little to the inquiry. Given that a habeas petitioner has ample motivation to lie at a federal hearing, a petitioner's own testimony that he did not commit the crime for which he was convicted,

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bruises on the throat, scratches on the face, scratches and bruises on the legs. . . . There was a cut on her left forehead." (Trial Tr. 791) Dr. Alex Carabia, who performed an autopsy, testified that Mrs. Muncey had bruises on the anterior and posterior aspects of her neck, on both thighs, on the lower right leg and left knee. Her injuries were consistent with a struggle and traumatic strangulation. (Trial Tr. 984-85, 987) In addition, FBI Agent Chester Blythe testified at trial that fibers found on the victim's nightgown, brassiere, housecoat, panties and in her fingernail scrapings were consistent "in every way that you could examine them" with House's blue jeans. (Trial Tr. 864-65)

[30] Moreover, Lawson's recollection of the timing of Muncey's alleged visit and request makes no logical sense. Muncey's presence at the dance on the night in question was undisputed (Evid. Hearing Tr., 2/1/99, pp. 56-57); he thus had no reason to ask Lawson or anyone else to lie about that fact.

absent clear corroboration, rarely constitutes reliable evidence of actual innocence. House posits that every reasonable juror would believe the following unbelievable scenario: that, at the precise time of Carolyn Muncey's murder and within a two-mile radius of the spot where her body was deposited, he was assaulted without provocation while walking alone by at least two complete strangers; that he hit them in order to escape and then ran across the road into the bushes; that he heard at least one or two gunshots fired behind him as he ran, at some point losing one shoe, then throwing the other away when he returned to his girlfriend's trailer, only then to discover that his shirt was missing (Evid. Hearing Tr., 2/3/99, pp. 104-06); and that he chose not to report this unprovoked violent assault to authorities for fear of getting into trouble (for no apparent reason) with his parole officer. (*Id.* at 108) House also posits that every reasonable juror would believe that he was seen near the victim's body the next morning only because he was looking for Mr. Muncey after learning that his wife was missing, that he twice "missed" the Muncey driveway before deciding to park on the side of the road and walk back toward his house, and that he just happened to encounter Billy Ray Hensley by coincidence near where the body was hidden. (*Id.* at 91) The district judge, who observed House's demeanor and considered the plausibility or implausibility of his story, specifically found that he was not a credible witness. (J.A. 239) Moreover, House's original jury also heard this story through the testimony of Donna Turner and law enforcement accounts of House's statements to them, and they too rejected it.[31]

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[31] House's attempt to discredit the trial testimony of Billy Ray Hensley also does little to advance his cause. First, Hensley was subjected to intense cross-examination at trial concerning his vantage point and observations. Second, it is beyond dispute that Hensley was able to lead others to the spot on the embankment above Mrs. Muncey's body after observing House in the vicinity. He also noted that House was carrying a "dark cloth," an item which, at the time, Hensley had no reason to know might be significant but which was, in all likelihood, the

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In sum, although House characterizes his case as so "extraordinary" that it amounts to "*Schlup* plus," upon examination of the record, the case resolves itself into a series of factual disputes of the type settled by jurors both for and against criminal defendants every day. Indeed, three primary components of House's case for "actual innocence" – the blood evidence, the accounts of a drunken "confession" by the victim's husband, and House's version of the events on the night of the murder – were rejected by the district court as being incredible, inconsistent with the uncontroverted evidence at trial, and/or rebutted by other evidence presented in the federal evidentiary hearing. And the only truly reliable item of new evidence – the DNA semen evidence – does not undermine any element of House's conviction for first degree murder under Tennessee law.

Even if House's evidence could be said to raise a reasonable doubt in the mind of one or even most jurors, that is not enough. *Schlup* requires that evidence supporting a claim of innocence be of such quality that no reasonable juror would reject it and convict. It is not enough simply to chip away at the State's evidence after the fact.[32] Instead, *Schlup* requires that a petitioner present reliable

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dark blue tank top House was wearing when he left Donna Turner's trailer the night of the murder. Both the original jury and the district judge, sitting as fact-finders, have rejected House's attempts to discredit Billy Ray Hensley. Morever, evidence that tends only to impeach testimony at trial is insufficient to establish actual innocence under *Schlup*. *See, e.g., Morris v. Dormire*, 217 F.3d 556, 559 (8th Cir. 2000) (ballistics expert testimony that victim was shot from ten feet away, which was less than the fifty-foot distance indicated by eyewitness at trial, coupled with testimony of two other witnesses contradicting eyewitness's version of events, insufficient to establish innocence under *Schlup*).

[32] Indeed, the proceedings that occurred in this case are precisely the type of federal habeas "retrial" that AEDPA was designed to prevent. *Williams v. Taylor*, 529 U.S. at 403-04; *Bell v. Cone*, 535 U.S. 685, 693 (2002).

evidence to support his claim – evidence that is concrete, verifiable, or otherwise beyond reasonable dispute. To require less would conflate *Schlup*'s actual innocence standard with the standard for prejudice. *See Strickland*, 466 U.S. at 695 (holding the prejudice requires a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt). The Sixth Circuit properly recognized this principle, and its decision should be affirmed.

II. HOUSE IS NOT ENTITLED TO RELIEF ON A SUBSTANTIVE, FREESTANDING CLAIM OF "ACTUAL INNOCENCE."

In addition to House's contention that he has presented sufficient evidence of "actual innocence" of the crime to establish a gateway for the review of his procedurally defaulted claims, he asserts that the evidence is sufficient to establish a substantive, freestanding claim of "actual innocence" that independently warrants federal habeas corpus relief. But House's assertion is bootless for three reasons. First, the issue whether the evidence establishes such a claim is not properly before the Court. Second, this Court's decision in *Herrera v. Collins*, 506 U.S. 390 (1993), on which House relies, does not authorize a freestanding claim of "actual innocence" as an independent ground for relief. Finally, even assuming arguendo the availability of such a freestanding claim, House has not made a "truly persuasive showing of 'actual innocence.'"

A. House's Freestanding "Actual Innocence" Claim Is Not Properly Before the Court and Should Not Be Reviewed.

House's substantive "actual innocence" issue was not presented in his brief filed in the court of appeals. Indeed, House did not even request from the court of appeals a certificate of appealability on this issue (Motion, filed Sept. 18, 2000), the grant of which is a jurisdictional prerequisite

to court of appeals' review of the issue.[33] *See* 28 U.S.C. § 2253(c). Although the en banc dissenting opinion of Judge Merritt discussed the claim sua sponte (J.A. 428-78), the majority did not address it at all, observing that the only issues presented by the appeal were whether the manner in which the Tennessee courts applied the state-law doctrine of waiver during House's post-conviction proceedings constituted an adequate and independent state procedural bar to his ineffective assistance of counsel claims and, if so, whether that waiver should be excused on the ground that House had established a gateway under *Schlup* for the review of his procedurally defaulted claims. (J.A. 395) The majority concluded: "Having considered the arguments of the parties regarding the two claims that are before us, we affirm the district court's denial of the writ. . . ." (*Id.*)

An issue neither raised before nor passed upon by the court of appeals is not properly before this Court and ordinarily will not be considered. *Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). This is not an exceptional case, where the petitioner is making a new argument for the first time in support of a claim properly presented below, *see, e.g., PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001) (where Americans with Disabilities Act coverage issue was raised below, Court would entertain new argument regarding scope of the statute), or where petitioner is presenting a "purely legal question" not addressed by the lower court. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) ("purely legal question" on Mitchell's claim of immunity held appropriate for resolution despite the fact that the court of appeals did not

[33] Despite House's limited request, *see* p. 13, *supra*, the court of appeals granted a certificate of appealability on "all isues raised in the petition." (Order, filed Oct. 18, 2000) Yet House briefed only two issues, neither of which presented a freestanding "actual innocence" issue.

address it). House abandoned his substantive "actual innocence" claim in the court of appeals, and there is no reason why it should be reviewed now.

B. House's Freestanding "Actual Innocence" Claim Is Not Authorized by *Herrera*.

House assumes that this Court's decision in *Herrera* makes available to him a freestanding claim of "actual innocence" as a ground for habeas corpus relief. But House's assumption is misplaced. In fact, a plain reading of *Herrera* makes it clear that House has no such claim.

The Court's opinion in *Herrera* reiterates a firmly entrenched habeas principle:

> Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas corpus relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. . . . This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact.

506 U.S. at 400 (citing *Townsend v. Sain*, 372 U.S. 293, 317 (1963)). Because "[t]he guilt or innocence determination in state criminal trials is 'a decisive and portentous event,'" *Herrera*, 506 U.S. at 401 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)), where "'[s]ociety's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens,'" 506 U.S. at 401 (quoting *id.*), this Court's habeas jurisprudence has consistently rejected the cognizability of a substantive actual innocence claim based on newly discovered evidence absent an independent constitutional violation occurring in the underlying state criminal proceeding. "'Federal courts are not forums in which to relitigate state trials.'"

Herrera, 506 U.S. at 401 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)). Indeed, as the *Herrera* majority observed, "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence." 506 U.S. at 401.

Throughout the opinion, *Herrera* returns to its premise that "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." 506 U.S. at 404. In order to overcome a procedural default, a prisoner may supplement his underlying constitutional claim with a showing of factual innocence demonstrating that a failure to review the merits of the claim would amount to a fundamental miscarriage of justice. *See, e.g., Kuhlmann*, 477 U.S. at 454. But, as Chief Justice Rehnquist observed, the Court has "never held that [the fundamental miscarriage of justice exception] extends to freestanding claims of actual innocence." *Herrera*, 506 U.S. at 405.

The language House seizes upon appears at the end of the majority opinion, where the Court states:

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.

Id. at 417. The Court never held, however, that actual innocence would entitle a petitioner to federal habeas relief. It simply assumed such a premise arguendo. House's reliance on *Herrera* as creating such a claim is therefore unjustified.

Yet a further bar to construing *Herrera* as expanding federal habeas law to include a freestanding claim of "actual innocence" is the conditional language House ignores: that federal relief would be warranted only "if there were no state avenue open to process such a claim."

This qualification was made in the context of the Court's remark that, under Texas law, Herrera could file a request for executive clemency. Noting that "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted," the Court observed that all states authorizing capital punishment have constitutional and statutory provisions for clemency and that "over the past century clemency has been exercised frequently in capital cases in which demonstrations of 'actual innocence' have been made." *Id.* at 411-15. Herrera had not applied for a pardon, or even a commutation, on the ground of innocence or otherwise. *Id.* at 416.

House does not assert that executive clemency is unavailable to him in Tennessee, nor can he. Tennessee has both constitutional and statutory provisions for clemency. *See* Tenn. Const., Art. III, § 6; Tenn. Code Ann. §§ 40-27-101 to 40-27-109 (2003). Indeed, not only does Tennessee's governor have the general power to grant "reprieves, commutations and pardons in all criminal cases after conviction," Tenn. Code Ann. § 40-27-101, but, specifically, he has the power to consider new evidence and, "[a]fter consideration of the facts, circumstances and any newly discovered evidence in a particular case, the governor may grant exoneration to any person whom the governor finds did not commit the crime for which such person was convicted." Tenn. Code Ann. § 40-27-109(a).[34] House has never applied for clemency, and there is nothing

[34] In addition, the Tennessee Supreme Court may certify to the governor that, in its opinion, "there were extenuating circumstances attending the case, and that punishment ought to be commuted." Tenn. Code Ann. § 40-27-106. *See also Workman v. State*, 22 S.W.3d 807, 808-809 (Tenn. 2000) (explaining that the court's certificate of commutation may issue based upon the facts in the record or a combination of record facts and new evidence that is uncontroverted).

in the record demonstrating that this historic remedy for assertions of "actual innocence" is unavailable to him.

Moreover, the Tennessee Post-Conviction Procedure Act allows a state prisoner to move to reopen his post-conviction action with respect to a legal claim if "[t]he claim in the motion is based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted" and "[i]t appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside. . . ." Tenn. Code Ann. § 40-30-117(a)(2), (4) (2003). House has made no showing that this procedure is unavailable to him either.[35]

Because *Herrera* cannot be read as establishing a freestanding "actual innocence" habeas claim, House's reliance on *Herrera* is misplaced. Nevertheless, House's phantom claim, even if cognizable, is defeated by the restrictive language of *Herrera* itself, which conditions the availability of such a claim upon there being no state avenue open to process it.

---

[35] In fact, House currently has pending in the Circuit Court of Union County, Tennessee, a "Motion to Reopen Post-Conviction Petition or, in the Alternative, Successive Petition for Post-Conviction Relief, Petition for Writ of *Error Coram Nobis* and/or Petition for Any and All Other Remedies Available to Petitioner under *Workman v. State*, 41 S.W.3d 100 (Tenn. 2001) and/or *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992)." *Paul Gregory House v. State of Tennessee*, Union County Circuit Court No. 632.

C. Even If a Freestanding "Actual Innocence" Claim Were Available to House, He Has Not Made a "Truly Persuasive Demonstration of 'Actual Innocence.'"

Assuming for the sake of argument that in a capital case a "truly persuasive demonstration of 'actual innocence'" would warrant federal habeas corpus relief, 506 U.S. at 417, *Herrera* observed that, "because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be "extraordinarily high." *Id.* For several reasons, House's showing falls far short of reaching that extraordinarily high threshold.

Although *Herrera* did not articulate a standard for what constitutes a "truly persuasive demonstration of 'actual innocence,'" House proposes the adoption of the standard espoused in Justice White's concurring opinion: "based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.'" 506 U.S. at 429 (White, J., concurring in the judgment) (quoting *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)). This standard is little more than the *Schlup* gateway standard with the quantum of proof modified, and, while it offers a rather clear, straightforward rule, it fails to assuage *Herrera*'s concerns about entertaining such claims.

The formulation of any standard for federal habeas determination of post-trial factual innocence, as opposed to legal innocence, should accommodate at least four basic principles. The first and foremost of these is that the state criminal trial is "the paramount event for determining the guilt or innocence of the defendant." *Herrera*, 506 U.S. at 416. At the state trial, the defendant is clothed with the presumption of innocence, and the State must marshal its

evidence at this critical point in time to overcome that presumption and prove the defendant's guilt beyond a reasonable doubt. Substantial societal resources – economic, political, moral, and judicial – are exhausted in order to achieve an outcome as accurate as humanly possible. The Constitution itself recognizes the trial's preeminence, investing it with an array of procedural safeguards designed to enhance the integrity and reliability of the proceedings. If, despite the fact that the trial comported with due process, the ultimate determination of guilt is to be made by a federal habeas court, the test for "actual innocence" claims must be exceedingly rigorous. Otherwise, the status of the state trial in the first instance is unjustifiably degraded. In this case, no court reviewing House's conviction has ever found that his trial failed to comport with due process of law or that the evidence was not legally sufficient.

Second, once afforded a fair trial and convicted, the petitioner no longer enjoys the presumption of innocence. *See Ross v. Moffitt*, 417 U.S. 600, 610 (1974) ("The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt"). Thus, in the eyes of the law, House does not come before a federal habeas court as one who is "innocent," but, instead, as one who has been convicted by due process of law of a heinous first-degree murder.

Third, it is important to recognize that "there is no guarantee that the guilt or innocence determination [by a federal habeas court] would be any more exact. To the contrary, the passage of time only diminishes the reliability of criminal adjudications." *Herrera*, 506 U.S. at 403-04. As this Court has recognized, "the 'erosion of memory and dispersion of witnesses that occur with the passage of time' prejudice the government and diminish the chances of a reliable criminal adjudication." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (quoting *Kuhlmann*, 477 U.S. at 473) (internal quotation marks omitted; citation omitted)). In

this case, House's state criminal trial took place in February 1986. The accuracy and reliability of any fact-finding almost twenty years removed from the original verdict must be seriously questioned.

Finally, any new post-trial evidence bearing on the question of guilt or innocence must be regarded as inherently untrustworthy. It is reasonable to presume that there is something suspect about a defense witness who does not come forward until the eleventh hour has passed. *See Herrera*, 506 U.S. at 423 (O'Connor, J., concurring) ("It seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him. Experience has shown, however, that such affidavits are to be treated with a fair degree of skepticism"). Indeed, in this case, the district court reached that very conclusion as to the belated testimony of House's witnesses, who claimed to have heard Hubert Muncey confess to the killing. ("The court is not impressed with the allegations of individuals who wait over ten years to come forward with their evidence." (J.A. 348)) The standard proposed by House does not satisfactorily accommodate these principles. By placing the new evidence on the same plane with the record evidence, House's standard denigrates the preeminence of the jury verdict and fails to discount the inherent untrustworthiness of post-trial evidence. Furthermore, by giving equal weight to newly discovered evidence and record evidence, it fails to account for the diminution of reliability that necessarily occurs with the passage of time. Finally, instead of clothing the convicted defendant with a presumption of guilt, a standard requiring the reviewing court simply to find that "no rational trier of fact could find proof of guilt beyond a reasonable doubt" assumes a neutral starting point.

The principles outlined above dictate that a habeas petitioner should be required to prove that the new evidence on which he relies demonstrates his innocence beyond a reasonable doubt. Because the petitioner is presumed guilty, merely calling the verdict into question is

not enough, and requiring him to demonstrate his innocence is reasonable. Moreover, due to the passage of time and the inherent untrustworthiness of eleventh-hour evidence, it is reasonable to place a significantly higher burden on the petitioner. Finally, requiring that the new evidence be evaluated under a significantly higher burden, shouldered by the petitioner who is attacking the jury verdict, ensures appropriate deference to the original fact-finder, the jury that found him guilty.

The application of this standard would be salutary for other reasons. First, it would assure that a defendant who presented evidence of actual innocence at trial is not placed in a less advantageous position on review than one who makes post-trial assertions of innocence based on newly discovered evidence. Second, it would discourage defendants from using the trial as an initial forum for testing the strength of the State's case before presenting other evidence later in another forum. Third, in capital cases, the high burden of demonstrating innocence would deter a variety of routine and often repetitive "actual innocence" claims foisted upon the federal courts at the last moment in an attempt to forestall an impending execution.

House does not come close to meeting either this standard or the standard he proposes. House's new evidence fails to establish his innocence beyond a reasonable doubt. The semen evidence does not disprove his guilt, Hubert Muncey's "confession" is neither credible nor supported by any physical evidence, and House's theory about the origin of the blood on his jeans is speculative and contradicted by expert testimony. And even viewing both the proffered newly discovered evidence and the entire record before the jury that convicted him, the case against House remains strong; a rational trier of fact would vote to convict. Under either standard, House falls far short of making a "truly persuasive demonstration of 'actual innocence.'"

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Appendix

28 U.S.C. § 2244 provides in pertinent part:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in the section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless —

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

* * *

28 U.S.C. § 2254 provides in pertinent part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

* * *

(9)

No. 04-8990

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In The
Supreme Court of the United States

PAUL GREGORY HOUSE,

Petitioner,

v.

RICKY BELL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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REPLY BRIEF OF PETITIONER

The State urges the Court to reject Mr. House's compelling demonstration of innocence on two grounds. First, it advances a legal argument which it waived in the district court, made untimely in the court of appeals, and withheld from its brief in opposition in this Court, and which is substantively specious. Second, it presents a view of the record and the district court's findings which is factually incomplete and inaccurate. When the facts are properly understood, they leave no doubt that Mr. House has made a showing of innocence more than sufficient to pass through the *Schlup v. Delo*, 513 U.S. 298 (1995), gateway. Such a showing, indeed, calls for relief under the still more demanding standard of *Herrera v. Collins*, 506 U.S. 390 (1993).

I. The State's Argument that AEDPA Amendments Supplanted *Schlup* Is Not Properly Before the Court and Lacks Merit.

The State belatedly seeks to interject into this case an argument that AEDPA amendments to the successor-petition and evidentiary-hearing provisions of the habeas statute implicitly alter the rule of *Schlup v. Delo* under which the case was litigated and decided below. This argument comes too late and is wholly lacking in substantive merit.

A. This argument is not properly before the Court.

In the district court, the State made no argument that any AEDPA amendments altered the *Schlup* standard; instead, it took the position that *Schlup*, as written by this Court, provided the governing standard for determining when a defaulted claim could receive merits review.[1] Both

[1] For example, in its Answer to the Amended Petition, the State said: "[i]n an extraordinary case where a constitutional violation has

(Continued on following page)

parties and the district court analyzed House's evidence of innocence under the *Schlup* test. *See* JA 347.

In the court of appeals, the State made no mention of its present AEDPA argument until the eleventh hour. The appeal was first briefed before a panel, then briefed twice before the *en banc* court. Throughout the panel briefing and the first *en banc* briefing, the State consistently asserted that this Court's *Schlup* decision provided the applicable rule of decision.[2] Only in a supplemental brief during the second *en banc* review did the State advance its AEDPA argument.[3] Seeing that this came so late, none of the fifteen judges of the court of appeals acknowledged it. Like the district court, both the majority and the dissenters assessed House's claim under the governing rule of *Schlup*. *See* JA at 410-11; 432-33; 480.

In this Court, in its brief opposing certiorari, the State argued that the Sixth Circuit's analysis comported with *Schlup*, that the court of appeals had correctly deferred to the district court's findings made as "a putative 'reasonable juror' for purposes of *Schlup*," and that there was no circuit split justifying certiorari. BIO at 13, 19. Nowhere did the Warden suggest that the rule of *Schlup* had been changed by AEDPA or that the standard for showing innocence had been elevated by AEDPA to "clear and convincing evidence." Under Supreme Court Rule 15.2, "a respondent has a duty to 'address any perceived misstatement of fact or law in the petition that bears on what

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resulted in the [conviction] of one who is actually innocent, a federal habeas court may grant the writ even absent a showing of cause for the procedural default. The Supreme Court has stated that to establish the requisite probability, a petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence that he has presented." Answer 66-67, citing *Schlup v. Delo*, 115 S.Ct. at 867. In discussing the fundamental miscarriage of justice exception in its Post-Evidentiary Hearing Brief/Closing Argument, the State again confirmed that *Schlup* set forth the governing standard. *See* page 2 of that document.

[2] *See* Warden's Proof Brief at 17-18, 26; Final Brief at 16-17, 29-30.

[3] *See* Warden's Supplemental Brief at 12-18.

issues properly would be before the Court if certiorari were granted.'" *Johnson v. California*, 541 U.S. 428, 431-32 (2004). Arguments made for the first time in merits briefing before this Court, seeking to alter the issues decided below and upon which *certiorari* was granted, need not be considered here. *E.g.*, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 212 n.2 (2004); *Roberts v. Galen of Virginia*, 525 U.S. 249, 253-54 (1999); *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 170-71 (1999); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022, n.9 (1992). And where, as is now the case, a respondent seeks to spring upon the Court belatedly an argument whose "complex nature ... and ... broad implications suggest that its consideration by the lower courts would help in its resolution," the Court has customarily "exercise[d its] ... Rule 15.2 discretion and deem[ed] the argument waived." *Baldwin v. Reese*, 541 U.S. 27, 34 (2004); *Alabama v. Shelton*, 535 U.S. 654, 660 n.3 (2002).

B. AEDPA did not change the rule of *Schlup* in first petition cases.

In any event, the State's argument that AEDPA amendments modified the rule of *Schlup* and now require a first federal habeas petitioner to demonstrate innocence by "clear and convincing" evidence in order to excuse a procedural default is baseless. The State itself concedes, as it must, that "the federal habeas statute does not specifically address procedural default of claims...." Resp. Br. at 22. But the State asks the Court to infer an implicit Congressional intent to abrogate *Schlup* by extrapolating from two 1996 amendments concerning, respectively, second or successive petitions (28 U.S.C. § 2244(b)) and the holding of evidentiary hearings (28 U.S.C. § 2254(e)(2)).[4]

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[4] AEDPA's amended § 2244(b) requires (with one exception) that a petitioner who is seeking to raise a previously-unraised claim in a second or successive federal habeas petition show that the facts underlying the claim would establish his or her innocence by clear and convincing evidence. By its terms, this provision applies only to a "claim

(Continued on following page)

AEDPA made extensive, elaborate, highly detailed amendments to federal habeas corpus practice, abrogating some previously established rules, refining others, and leaving still others intact. Congress obviously knew what it wanted to change and what it did not. It did not undertake to change the *Schlup* standard for adjudicating assertions of actual innocence as miscarriages of justice that will excuse the procedural default of a claim "when dismissal of a *first* habeas petition is at issue." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). And a statute that selectively modifies some things but not others presents an overwhelming case for indulging "the fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones v. United States*, 526 U.S. 227, 234 (1999).

II. The State's *Schlup* Submission Distorts the Record, Which Shows that the Prosecution's Circumstantial Case Was Based on False and Wholly Unreliable Evidence.

Schlup holds that when a habeas petitioner adduces new evidence of innocence to justify review of a defaulted claim, the new evidence must be examined in the context of all the evidence in the record. 513 U.S. at 327-28. The State's submission flouts this rule. It urges the Court to look only at the evidence that supports the State's case, not all the evidence. And in doing so, again and again it

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presented in a second or successive habeas corpus application," not to first habeas corpus applications, like Mr. House's. Likewise, AEDPA's amended § 2254(e)(2) forbids federal evidentiary hearings when a habeas petitioner has failed to develop facts in state court, unless he or she shows that these facts establish innocence by clear and convincing evidence. By its terms this provision deals only with the circumstances under which a federal district court may "hold an evidentiary hearing," not with the circumstances under which the procedural-default rule of *Wainwright v. Sykes*, 433 U.S. 72 (1977), will be excused – the question presented in Mr. House's case.

omits important facts and mischaracterizes the district court's factual findings.

The State's aversion to discussing the full record is understandable. For what that record shows is that the State's case against Mr. House at trial consisted of several items of circumstantial evidence only tenuously suggesting guilt, held together and powerfully bolstered by seemingly unassailable scientific evidence: semen consistent with House's found on Ms. Muncey's clothing; Ms. Muncey's blood found on Mr. House's blue jeans. This powerful scientific evidence served both to identify Mr. House as Ms. Muncey's killer and to supply the sole theory offered by the prosecution to explain why Mr. House might have wanted to kill her. But all of this scientific evidence has now been proved worthless, with the State (1) conceding that the semen on Ms. Muncey's clothing was her husband, Hubert Muncey, Jr.'s, and (2) unable to account for one full test tube of blood from Ms. Muncey's autopsy which, according to Dr. Cleland Blake, the Assistant Chief Medical Examiner for the State of Tennessee, most likely got onto Mr. House's blue jeans while the jeans and the autopsy blood were bundled together in police custody.

Thus, the whole record reveals much more than a prosecution case no longer capable of convincing reasonable jurors of Mr. House's guilt. It reveals that the scientific-seeming evidence so crucial to the prosecution's theory of guilt at trial was affirmatively misleading. And the record also contains post-trial evidence specifically identifying the person who probably did kill Carolyn Muncey by beating her savagely on the night of July 13, 1985. That person was not Mr. House, who, the evidence shows, was two miles away and without transportation at the time of the killing. It was Hubert Muncey, Jr., who had previously beaten his wife (so that no fewer than four witnesses recalled seeing her prior injuries), who was seen striking his wife near a dance just shortly before her death, who tried to arrange an alibi for the time of her death, who lied about not seeing his wife after he left home early that morning, who lied to law enforcement and to the district court about his history of spousal abuse, and

who later tearfully confessed to friends that he had done the killing.

Unlike the State, Mr. House invites this Court's examination of all the evidence of record. He acknowledges that some of the individual circumstances that the prosecution presented to convict him *could* still be viewed as indicative of guilt. The full record, however, reveals that many of those circumstances provided only equivocal support for the prosecution's case, and that – in order to tie them together and to tie Mr. House to the crime – the prosecution necessarily placed heavy reliance on supposedly unimpeachable scientific evidence that has now been shown to be anything but unimpeachable.

A. On the whole record, the prosecution's circumstantial case without its scientific evidence is equivocal at best, in part exculpatory, and entirely inadequate to convince a reasonable juror of Mr. House's guilt beyond a reasonable doubt.

Wherever the State points to evidence supporting its theory of Mr. House's guilt, the whole record contains countervailing, reliable evidence of Mr. House's innocence. Yes, the record reveals that on the night Carolyn Muncey disappeared from her home, Mr. House was absent from his girlfriend's trailer for an hour and returned bearing signs of a struggle. JA 134-35. But it also reveals that the trailer was two miles from the Muncey home, JA 82, and that Mr. House did not leave the trailer until the time that Ms. Muncey was leaving her home. R4, Vol. VIII, p. 1106. Yes, the record reveals that Mr. House has a low voice and that Ms. Muncey was beckoned from her home by a man with a low voice who honked a car horn. JA 18, 21-22. But it also reveals that Mr. House had no access to a car at the time. JA 87-88, 95-98. The prosecution witness who testified to hearing the man's low voice was Ms. Muncey's ten-year-old daughter, Laura. But Laura also testified that she did not hear any sounds of a struggle at the time when Mr. House was supposedly beating her mother to death

while attempting to rape her. JA 18-27. And some time after Laura woke briefly and heard the man with the low voice, there is evidence placing Carolyn Muncey in the parking lot of the C&C Recreation Center, where she argued with her husband, Hubert Muncey Jr., and the argument ended with his striking her. JA 225-30.

Yes, the record contains testimony by FBI Agent Chester Blythe that on every item of Ms. Muncey's clothing he located blue jeans fibers "consistent in every way that you could examine them" with fibers taken from the blue jeans Mr. House was wearing on the night of the murder. Resp. Br. at 37 n.29. But it also contains Agent Blythe's concessions that (1) the fibers were so common that they could as easily have come from the jeans then being worn by many of the jurors listening to his testimony, R4, Vol. VI, pp. 868-69; and (2) Ms. Muncey's housecoat, bra, and panties were all made of cotton, R4, Exhibit 32; and (3) cotton clothing readily transfers fibers and retains transferred fibers, R4, Vol. VI, p. 867; but (4) no fibers from Ms. Muncey's clothing were found on Mr. House's blue jeans. *Id.*

Yes, the record contains lay testimony by Mr. House's girlfriend, Donna Turner, that she observed injuries to Mr. House's body after he returned to the Turner trailer on the night Carolyn Muncey was murdered. R4, Vol. VI, pp. 1129-30. But it also contains the expert medical testimony of Assistant Chief Medical Examiner of the State of Tennessee, Dr. Cleland Blake, concluding – on the basis of decades of experience and training – that (1) those injuries were too old to have come from a struggle the same night, and (2) they were inconsistent with striking another person. JA 241-43.

Yes, the record contains testimony by Billy Ray Hensley that he saw Mr. House in the vicinity of Ms. Muncey's body on the afternoon following her murder. From the State's argument, one would suppose that the evidence relating to Mr. Hensley's observations of Mr.

House that afternoon consists of Mr. Hensley's testimony that he saw House wiping his hands on a black[5] rag and that, when Hensley soon thereafter returned with a friend, Hensley led the friend to a location from which the friend was able to see Ms. Muncey's body. JA 133. But this is not what the record shows. It shows that (1) when Hensley returned with his friend to the place where he had seen Mr. House, Ms. Muncey's body was not visible from that location or nearby, R4, Vol. V, p. 727; (2) Hensley admitted on cross examination that his original claim that he had seen Mr. House coming up the embankment above Ms. Muncey's body was false; his testimony ultimately was that he saw House only near the roadway, *id.* at 745; and aerial photographs introduced in federal court demonstrated Hensley's view was blocked by a barn, R279, Exhibit 6; (3) Hensley testified that House had affirmatively attracted Hensley's attention by waving him down and telling him that House was looking for Mr. Muncey to help him search for his wife, R4, Vol. V, pp. 690-91; (4) this is consistent with a statement made by Mr. House to the police describing his presence on the roadway that afternoon and his reason for being there, R4, Vol. VII, pp. 966-67; and (5) it is also consistent with testimony by Billy Hankins that he saw a man fitting House's description walking toward the Muncey home along the roadway that day, R4, Vol. VIII, pp. 1176-78, and with testimony by Donna Turner that she saw Mr. House and Mr. Muncey together later in the day. R4, Vol. VIII, p. 1115.

And, yes, the record does show that Mr. House lied to the police about his one-hour absence from Donna Turner's trailer and about the clothes he was wearing on the night of Ms. Muncey's murder. It does show that he gave varying

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[5] The State and the courts below repeatedly describe Hensley's testimony as saying that the rag was "dark." Resp. Br. at 38, n.31; JA 133. This description would perhaps support the prosecution's contention that the rag was actually House's yellow-trimmed navy blue tank top. JA 91. But Hensley's testimony was quite specific that the rag was "black." JA 32-33.

accounts of the origins of his injuries. But it also shows, as House has already pointed out, that the truth about these events is exculpatory: the bruises were unrelated to the crime, regardless of their origin, and Mr. House's absence from Donna Turner's trailer was inconsistent with House's being the low-voiced person who called Ms. Muncey from her home.

Because the most incriminating pieces of the evidence just discussed were featured prominently in the decisions of the Sixth Circuit majority and of the district court below, we have thought it necessary here to put them into context for this Court's review. Whatever can be said about them or inferred from them in support of the prosecution's case against Mr. House, we think it self-evident that no reasonable juror would conceivably have voted to convict Mr. House of murder on the basis of this evidence alone. That is why the prosecution went to great pains at trial to construct a case for guilt that centered upon apparently incontrovertible forensic-scientific evidence – a case in which semen and blood and their analyses were the critical ingredients, not only of the prosecution's proof of Mr. House's identity as a murderer, but also of the sexual motivation that provided the prosecution's sole theory of why he murdered Ms. Muncey and how the whole sequence of events leading to her death that night unfolded.

B. On the whole record, the prosecution's critical scientific evidence has now been shown to have little or no incriminating force.

The State's disregard of the full record is most glaring when it comes to facts that demonstrate the unreliability or outright falsity of the scientific evidence which the prosecution presented at trial. Here is what the record shows on that score:

1. DNA evidence refutes the prosecution's theory of the case.

At trial, the prosecution elicited expert testimony that semen stains were found on Ms. Muncey's underwear and robe and were consistent with Mr. House's blood type and secretor status. The prosecutors asked the jury to infer from this damning evidence that House attempted to rape Ms. Muncey, she resisted, and he killed her. This was the only reason ever suggested why Mr. House might have assaulted Ms. Muncey. It was made to look persuasive because defense counsel presented no expert rebuttal and could do no more than suggest that that the stains may have been from Hubert Muncey's semen.

DNA testing has now conclusively excluded House and identified Muncey as the source of the semen. Forced to admit this, the State attempts to write a revisionist history of the trial in which the prosecution's entire theory of the case is jettisoned *ex post* and this Court is hoodwinked with statements like "[t]he State never contended at trial that House raped the victim or even that the semen found on Mrs. Muncey's nightgown could only have come from the petitioner." Resp. Br. at 29. While such assertions are carefully crafted to avoid literal inaccuracy, their false implications are manifest as soon as one asks *what else was the prosecution's elaborate expert testimony about the semen stains on Ms. Muncey's garments*[6] *intended to prove,* ***if not*** *that Mr. House* ***attempted*** *to rape her, that the attempted rape was his* ***motive*** *for an otherwise inexplicable assault on Ms. Muncey, and that the attempt left her clothing marked with semen that* ***was consistent with Mr. House's emissions***? What else than this line of proof was the prosecution seeking to bolster when it took the steps it did to deny Mr. House's defense counsel access to available means of disputing that the semen stains on Ms.

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[6] *See, e.g.*, the testimony of FBI expert Paul Bigbee, set out in the dissenting opinion of Judge Merritt below. JA 441-43.

Muncey's clothing were left there by Paul Gregory House?[7] To what else than this line of proof was the prosecution referring when it argued in closing to the jury that Mr. House's evident motive for the killing was "that he was subjecting the lady to some kind of indignity . . . and . . . kill[ed] her because of her resistance"?[8] And by what other logic was the prosecution proceeding when it sought a death sentence for Mr. House on the theory that he killed Ms. Muncey in an attempt to rape her[9] and when it argued to the jury that Mr. House was a previously convicted sex offender who had shown by this rape attempt that he was incapable of rehabilitation?[10] In stark contrast to the State's present cavalier dismissal of the importance of the semen evidence, the trial prosecutors knew very well that their case for guilt and death depended crucially on linking the semen evidence to Mr. House – a link we now know was falsely forged.

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[7] Mr. House's prosecutors knew that Hubert Muncey, Jr., had told investigators that he and his wife had had sexual relations on the last morning of her life. If Muncey was truthful, these relations could refute the notion that the semen stains on Ms. Muncey's clothing were evidence of an attempted rape by her murderer. So the prosecutors took two steps to make sure the jury never heard about this innocent explanation of the stains. First, they did not disclose Hubert Muncey's statement to defense counsel. JA 264-66. Second, they did not send the FBI lab information that would have allowed a determination of Hubert Muncey's secretor status. R4, Vol. VI, p. 928. These tactics left the defense without proof to support its argument that the best explanation for the semen stains was recent relations between Ms. Muncey and her husband.

[8] R4, Vol. IX, pp. 1302, 1305.

[9] One of the three statutory aggravating circumstances that State asked the jury to find at the penalty phase was that the murder was committed while the defendant was committing or attempting to commit rape or kidnapping. JA 109.

[10] *See* the passages of the prosecution penalty-phase argument set out in the dissenting opinion of Judge Merritt below. JA 443-44.

2. The whole record now leaves the prosecution's bloodstain evidence subject to inescapable doubts.

FBI testing of jeans that House wore on the night of the crime showed several very small bloodstains consistent with Ms. Muncey's blood, a finding confirmed as to one of these stains by DNA testing. The State continues to urge that these findings establish House's identity as Ms. Muncey's killer despite post-trial evidence that the stains most likely came to be on the jeans through transfer from a test tube containing Ms. Muncey's autopsy blood. To disparage the post-trial evidence, the State necessarily regales this Court with an attack upon the credibility of its own Assistant Chief Medical Examiner, Dr. Cleland Blake, which no prosecutor would risk presenting to a Tennessee jury.

Dr. Blake's post-trial testimony was unequivocal that the bloodstains on Mr. House's jeans had been caused by degraded, "rotted," liquid blood of the kind which was missing from one of the test tubes of autopsy blood that had been packaged with the jeans for transmission to the FBI lab for testing. *See* Pet. Br. at 16-21; *see also* the more detailed discussion in the dissenting opinion of Judge Merritt below. JA 446-55. In response, the State asserts that Dr. Blake's "opinion was based entirely upon an erroneous interpretation of an abbreviation contained in the report [of FBI Agent Bigbee, who had done the prosecution's blood testing]." Resp. Br. at 32 n.22. This claim is based in turn upon Agent Bigbee's comment that Bigbee did not have "the foggiest idea" how Dr. Blake came up with the notion that the initials "INC" in Bigbee's reports stood for "incomplete." The State fails to inform this Court that (1) Bigbee himself testified at Mr. House's trial that the initials "INC" stood for an "incomplete" result, and thereafter used the term "incomplete" as interchangeable with the term "inconclusive," R4, Vol. VI, p. 906; and (2) when Dr. Blake was asked about his use of the term "incomplete," Dr. Blake stated that he meant the same thing. R275, Vol. II, p. 119. The State also points to Agent Bigbee's testimony that he disagreed with Dr. Blake's

expert opinion, but ignores (1) Agent Bigbee's concession that Dr. Blake's conclusion was a reasonable explanation for the similarities in the degradation of the two blood specimens, R276, Vol. III, p. 170, and (2) the fact that Dr. Blake and Agent Bigbee were in total agreement regarding the basic scientific principles regarding blood degradation upon which Dr. Blake relied.

Unable to discredit Dr. Blake's opinion with scientific evidence, the State turns to blood-spatter expert Paulette Sutton and argues that the transfer bloodstains on the jeans are inconsistent with direct spillage and consistent with a bloody object being wiped across Mr. House's jeans while they were being worn. Here the State neglects to mention (1) that Ms. Sutton conceded she could not determine the nature of the bloody object or who wiped the object, R276, Vol. III, p. 217, and (2) that the basis for Ms. Sutton's conclusion that the mixture of blood and mud on Mr. House's jeans is inconsistent with a transfer occurring in the evidence container was *Ms. Sutton's opinion that the transfer would have occurred when the mud was wet.* The latter omission is particularly misleading because the record shows that Mr. House's blue jeans had moist mud on them when they were seized by law enforcement, JA 274, and that there was no mud at the crime scene. JA 304, 308, 310. The Warden also fails to mention that although Ms. Sutton found bloodstains on the inside of the cuff area of Mr. House's blue jeans, she was unable to detect any blood on the tennis shoes he was wearing the night of the crime – shoes that did not come into the possession of law enforcement until *after* the autopsy samples and blue jeans had been transported to the FBI. JA 291-92, 296, 305.

The State next tells this Court that a reasonable juror would reject Dr. Blake's expert finding of autopsy-blood spillage because TBI Agent Charles Scott testified that when Scott initially seized Mr. House's jeans he saw stains which he thought "might" have been blood on them. In this submission, the State disregards the ample evidence that the stains on Mr. House's blue jeans that actually were Ms. Muncey's blood were very small and barely discernable, if discernible at all, to the naked eye. Finally, the

State simply ignores the fact that Dr. Blake's opinion regarding the source of the bloodstains is the only opinion which explains *the incontrovertible fact that the entire contents of one of the tubes of autopsy blood remains completely unaccounted for*. That the State can make an argument so full of misleading half-truths suggests how very unlikely it is that any reasonable juror hearing what remains of the prosecution's case at trial could fail to have a reasonable doubt of Mr. House's guilt.

3. The State gains no fair support from the district court's findings of fact.

The State asserts that Mr. House's showing of "'reliable, credible evidence of innocence'" is defeated by "valid credibility determinations entrusted to the district court as trier of fact at the federal evidentiary hearing." Resp. Br. at 16. But the district court's actual "credibility determinations" are few and immaterial;[11] and its only factual finding of consequence to which the State can point is: "the court concludes that the spillage [of blood from the test tubes packaged with Mr. House's jeans] occurred after the FBI crime laboratory received and tested the evidence." (JA 348; *see* Resp. Br. 33, 39.) This finding has two palpable flaws. Legally, it does not speak to the relevant *Schlup* gateway inquiry whether a reasonable juror, hearing that the State's crucial bloodstain evidence had been produced

[11] The district court divided its memorandum opinion into distinct sections containing findings of fact and conclusions of law. In its findings of fact, it summarized, largely without comment, portions of the Tennessee Supreme Court's opinion and portions of the evidence presented at the evidentiary hearing. Throughout, the court made only three credibility findings. It noted that Laura Tharp, the victim's daughter, was a credible witness and that she had testified consistently with her testimony at trial. JA 323. It found from Mr. House's demeanor that he was not a credible witness. JA 329. And it found that the fact that Mr. Muncey had engaged in sexual intercourse with his wife on the morning of her death indicated at least a "modicum of compatibility." JA 325. These findings do not reinvest with any confidence the State's failed case for Mr. House's guilt.

by a process in which some of the victim's missing, degraded autopsy blood, not fresh blood, stained the suspect's jeans – *and* hearing Tennessee's Assistant Chief Medical Examiner testify that the blood on the jeans was degraded autopsy blood – would entertain a reasonable doubt of the prosecution's proof of identity. (See Judge Merritt's trenchant analysis at JA 446-55.) And, factually, this finding by the district court is clearly erroneous.

The district court stated only that the "evidence introduced during the evidentiary hearing" supported its conclusion. JA 348. Certainly, photographic evidence and blood stains on the outside of the Styrofoam box containing the autopsy samples show that a small amount of blood leaked from *one* of the autopsy sample tubes onto the surrounding packing material and the Styrofoam box after the FBI had received and tested Mr. House's blue jeans. But the photographic evidence also shows that a *second* autopsy sample tube was *completely empty* when it arrived at the laboratory of a Tennessee serologist, and that none of the blood from that sample had leaked inside of the Styrofoam container. JA 307. TBI Agent Charles Scott stated in an affidavit that he had personally carried the autopsy samples from the FBI crime laboratory to the serologist and that he neither spilled blood nor observed any spillage of blood from the autopsy samples after FBI testing. R123, Attachment 1. Agent Bigbee, the person at the FBI crime laboratory who tested the autopsy samples, stated that he used no more than one-fourth of one autopsy sample during the course of testing. R276, Vol. III, pp. 161, 164. He also testified that there was no accidental spillage of blood from the autopsy samples while they were in the possession of the lab. JA 279. While there was conflicting evidence about what happened to the missing three-fourths tube of autopsy blood, the uncontradicted evidence in the record shows that the blood *from that* tube did not "leak" or "spill" after the FBI crime laboratory had received and tested Mr. House's blue jeans. Any conclusion or "finding" by the district court that it did is clearly, palpably erroneous.

C. A proper inquiry under *Schlup* or *Herrera* requires consideration of the entirety of evidence indicating Hubert Muncey's guilt.

The State largely dismisses the substantial evidence pointing to Hubert Muncey, Jr., as the person who very probably killed Carolyn Muncey. It justifies this disregard of the evidence by asserting that the district court made one additional finding of fact, *i.e.*, that Kathy Parker and Penny Letner, the two friends of Mr. Muncey's who testified that he confessed the murder to them, were incredible. But the record shows no such finding. The district court did not find that either Ms. Letner or Ms. Parker was not a credible witness. It stated only that it was "not impressed with the allegations of individuals who wait over ten years to come forward with their evidence" especially when "there was no physical evidence in the Munceys' kitchen to corroborate his alleged confession that he killed her there." JA 348. This discussion of the women's testimony appears in the court's conclusions of law and reveals on its face that it is based upon faulty reasoning. But even if it were to be treated as a finding of fact, it is also clearly erroneous.

Ms. Parker and Ms. Letner did not "wait over ten years to come forward with their evidence." Ms. Parker testified without rebuttal or impeachment that she went to the police to report Mr. Muncey's confession the very next day after he made it, but that no one would listen to her. And the district court's suggestion that the women's testimony conflicts with Laura Tharp's statement that she saw no sign of a struggle in the kitchen when she got up to look for her mother is doubly unfounded. First, neither Ms. Letner nor Ms. Parker testified that Mr. Muncey said he killed his wife in the kitchen. Second, there is unrebutted and unimpeached evidence that Ms. Muncey was not killed until later in the evening, after Laura and her brother had returned to bed and gone back to sleep. R4, Vol. V, p. 671.

The record also flatly contradicts the district court's implication that Hubert Muncey's confession, as heard by

Ms. Letner and Ms. Parker, is uncorroborated. The record reveals: (1) the trial testimony of the medical examiner that Ms. Muncey died from a blow to the head, resulting in her very nearly immediate unconsciousness – which comports with Mr. Muncey's admission of inflicting a blow to his wife's head that resulted in her immediate unconsciousness, R4, Vol. VII, pp. 993, 1014; JA 232-33; (2) the trial testimony of several witnesses that Ms. Muncey's body was found near the Muncey home partially hidden under branches and with injuries consistent with being dragged through the woods, R4, Vol. V, p. 765, Vol. VII, pp. 1013-14 – which comports with Mr. Muncey's admission that, upon finding he had killed his wife, he hid her body to avoid going to jail, JA 233; (3) Mr. Muncey's denial that had ever abused his wife, R276, p. 44 – despite the testimony of no less than four witnesses, including Constable Wallace, that they had either seen Ms. Muncey's face bearing the marks of prior assaults or knew of Mr. Muncey's reputation in the community as a spousal abuser, R4, Vol. VII, p. 1087; R274, pp. 13, 15-16, 39; (4) Mr. Muncey's assault upon his wife earlier on the night she was killed, JA 225-30 – together with his subsequent denial of having even seen her at that time, R276, pp. 40-41; and, (5) Mr. Muncey's claim that he did not leave the dance until it ended around one o'clock in the morning, *id*, – despite Constable Wallace's testimony that Mr. Muncey left the dance earlier in the evening and did not return. R276, p. 56.

Ms. Parker and Ms. Letner would be highly credible to any reasonable juror, and the district court's only stated reasons for dismissing their testimony are neither reasonable nor prognosticative of a juror's probable reaction to it. Both women are long-time friends of Mr. Muncey's and neither has any connection to Mr. House or any reason to lie to help Mr. House. Their testimony is internally consistent, it is corroborated in key respects by the physical evidence, and, when viewed in the light of the entire record, it accords well with the testimony of several other witnesses (Mary Atkins, Ricky Green, Constable Wallace, and Hazel Miller) and is more consistent with the testimony of Laura Tharp Muncey than is the prosecution's

theory of the case. Both the district court and the Sixth Circuit majority erred in failing to give appropriate weight to all of the evidence of Hubert Muncey's identity as the actual killer of his wife, which complemented Mr. House's demonstration of his own innocence. Together, the two kinds of evidence more than meet the *Schlup* gateway standard of undermining confidence in the trial verdict to such an extent that it is probable no reasonable juror would vote to convict Mr. House on the prosecution's wholly disjointed, partly exculpatory, and fundamentally equivocal remaining evidence.

III. Mr. House is Also Entitled to Relief Under *Herrera*.

The State argues that Mr. House's claim of a right to be spared execution if he has proved his innocence by newly discovered evidence is not before the Court.[12] It is.

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[12] It also argues (1) that "a plain reading of *Herrera* makes it clear" that a death-sentenced inmate has no federal constitutional right to avoid execution by a mere showing of innocence (Resp. Br. at 42); (2) that if such a right exists, the standard for claiming it should be proof of innocence beyond a reasonable doubt, (Resp. Br. at 46-49); and (3) that Mr. House's evidence of innocence fails to meet even the less exacting standard proposed by Justice White's concurring opinion in *Herrera*. (Resp. Br. at 49). We have addressed arguments (2) and (3) at Pet. Br. at 46-49 and see no need to add here anything more than the citations which confirm that a majority of the Justices in *Herrera* did not endorse the view that the State's argument number (1) plainly reads into that decision. *See* 506 U.S. at 427 ("Nowhere does the Court state that the Constitution permits the execution of an actually innocent person. Instead, the Court assumes for the sake of argument that a truly persuasive demonstration of actual innocence would render any such execution unconstitutional and that federal habeas relief would be warranted if no state avenue were open to process the claim.") (Justices O'Connor and Kennedy, concurring): *id.* at 429 ("In voting to affirm, I assume that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case.") (Justice White, concurring); *id.* at 431 ("We are really being asked to decide whether the Constitution forbids the execution of a person who has been validly

(Continued on following page)

Mr. House pleaded the claim in his habeas corpus petition, and the court of appeals granted a COA on all claims. In the court of appeals, although Mr. House did not make a separate submission of his case for innocence under *Herrera*, both parties extensively briefed the factual question whether and to what extent Mr. House's new evidence had destroyed the prosecution's case against him and shown him to be a victim of mistaken identity – *i.e.*, actually innocent in the ordinary sense of that phrase. The only difference between "actual innocence" for *Schlup* purposes and "actual innocence" for *Herrera* purposes is the *quantum* of proof of innocence required; and the principal dissent in the court of appeals found Mr. House innocent enough to satisfy *Herrera*.

28 U.S.C. § 2106 informs both this Court and the court of appeals that when the judgment of a lower court is "lawfully brought before it for review," it may "direct the entry of such appropriate judgment . . . or require such further proceedings to be had as may be just under the circumstances." Six dissenting judges in the court of appeals, after considering Mr. House's argument that he was "actually innocent" for *Schlup* purposes, concluded that his proof of innocence was so overwhelming as to constitute "actual innocence" for *Herrera* purposes as well. They therefore voted to give him the relief appropriate under *Herrera*. A majority of the court of appeals should have done the same under § 2106 if it reached the same conclusion; and this Court should do the same if it, too, finds the *Herrera* standard satisfied.[13] The propriety of

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convicted and sentenced but who, nevertheless, can prove his innocence with newly discovered evidence. Despite the State of Texas' astonishing protestation to the contrary, . . . , I do not see how the answer can be anything but 'yes.'") (Justices Blackmun, Stevens and Souter, dissenting).

[13] The State suggests that state judicial remedies may still be available to Mr. House. (Resp. Br. at 45 & n.35.) The suggestion is disingenuous. Mr. House has fruitlessly sought to reopen his former state habeas petition so that the habeas court could, *inter alia*, hear his evidence of innocence. Although that motion was filed three years ago, the State has never filed an answer and the court has done nothing. This is the

(Continued on following page)

such a disposition, in the light of § 2106 and the inherent relationship between the *Schlup* and *Herrera* issues, is established *a fortiori* by this Court's recent exercise of its discretion to consider an argument raised and briefed here, although not raised in a federal court of appeals in exactly the same terms, in *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001).

CONCLUSION

The decision of the court of appeals denying Mr. House relief for innocence should be reversed.

Respectfully submitted,

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proceeding that the State describes in its footnote 35 without mentioning the age and posture of the case. The State also argues that Mr. House must pursue executive clemency proceedings before raising a *Herrera* claim. (Resp. Br. at 44-45.) It fails to mention that under Tennessee law clemency is to be considered only after the conclusion of state and federal postconviction proceedings. *See Coe v. State*, 17 S.W.3d 249, 250 n.1 (Tenn. 2000).

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No. 04-8990

IN THE

Supreme Court of the United States

PAUL GREGORY HOUSE,
Petitioner,

v.

RICKY BELL, WARDEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

In response to recent exonerations of numerous individuals who were "actually innocent" of the serious crimes of which they had been convicted, the American Bar Association has engaged in substantial study of issues relating to actual innocence, and has adopted a number of policies that address now-recognized weaknesses in the criminal justice system that have led to erroneous convictions. The ABA therefore files this *amicus* brief to address the following question:

> What factors should this Court consider in formulating and applying standards for "actual innocence" claims under either *Herrera* v. *Collins*, 506 U.S. 390 (1993), or *Schlup* v. *Delo*, 513 U.S. 298 (1995), in light of now-acknowledged flaws in the criminal justice system that can cause erroneous convictions—flaws not well-recognized when *Schlup* and *Herrera* were decided?

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In the Supreme Court of the United States

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PAUL GREGORY HOUSE,
Petitioner,

v.

RICKY BELL, WARDEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE ABA AS AMICUS CURIAE[1]

The American Bar Association is the world's largest voluntary professional membership organization and the leading organization of the legal profession in the United States. It has long been dedicated to promoting a fair and balanced system of justice. Its mission is to serve the public and the profession by promoting justice, professional excellence, and respect for the law. Among the ABA's Goals are "[t]o promote improvements in the American system of jus-

[1] Pursuant to Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

tice" and "[t]o provide ongoing leadership in improving the law to serve the changing needs of society."[2]

The ABA's 408,000 members reside in all 50 States and other jurisdictions. ABA members include prosecutors, public defenders, private attorneys, legislators, law professors, law-enforcement and corrections personnel, law students, and non-lawyer "associates" in related fields. The ABA devotes substantial resources to the development of policies that speak to current legal issues. It approves such policies only after significant study, discussion, and consideration of comments from all segments of its membership.[3]

Petitioner, who is under sentence of death in Tennessee, asks the Court to identify and clarify the standards suggested in *Schlup* v. *Delo*, 513 U.S. 298 (1995), and *Herrera* v. *Collins*, 506 U.S. 390 (1993), for evaluating claims of "actual innocence" in federal habeas corpus proceedings. The ABA takes no position regarding the desirability of capital punishment. However, in light of the finality and severity of the death penalty, the ABA has long been concerned about the fair and balanced administration of justice in capital cases.

In 1990 after much study, the ABA adopted a set of policies related to the litigation of federal death penalty habeas corpus actions.[4] As explained below, portions of these Capital Habeas Corpus Litigation policies are relevant to the Court's resolution of the questions presented by Petitioner.

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[2] *ABA Policy and Procedures Handbook, 2004-2005* (Goals I & III), *available at* http://www.abanet.org/about/goals.html.

[3] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[4] These 1990 Capital Habeas Corpus Litigation policies, as well as the texts of all other ABA policies referenced in this brief, are reproduced in the accompanying appendix (App. 1a-14a).

In addition, the ABA has recently engaged in substantial study of, and policy-making regarding, claims of actual innocence by defendants in non-capital as well as capital cases. This effort was begun in the late 1990s as the seriousness and legitimacy of some "actual innocence" claims, and the flaws in the criminal justice system that can engender them, began to gain public recognition and acceptance.[5] As a 2005 ABA report noted, "recent exonerations of convicted defendants condemned to death have demonstrated the fallibility of a process susceptible to human error." ABA Report, *Systemic Remedies* 2 (Aug. 2005).[6]

Thus in the wake of "emerging instances of convicted persons who are exonerated by DNA and other biological evidence," ABA Report, *Criminal Justice*, No. 115, at 2 (July 2000), the ABA has adopted "Principles Concerning Biological Evidence" (App. 8a) that bear on this case in light of Petitioner's presentation of (1) DNA evidence that contradicts a portion of the prosecution's claims at trial and (2) evidence of mishandling of blood-sample evidence that was important to the prosecution's case.[7]

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[5] Similarly, acknowledging the changed legal and factual landscape of innocence claims, last year Congress enacted the Justice For All Act, Pub. L. No. 108-405 (2004), which encompassed the Innocence Protection Act, 18 U.S.C. § 3600 *et seq.* *See also United States* v. *Sampson*, 275 F. Supp. 2d 49, 56 (D. Mass. 2003) ("[I]n the past decade, substantial evidence has emerged to demonstrate that innocent individuals are sentenced to death, and undoubtedly executed, much more than previously understood."); *Harvey* v. *Horan*, 285 F.3d 298, 305-306 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing *en banc*) ("[T]hese scientific advances must be recognized for the singularly significant developments that they are. . . .").

[6] All of the ABA's Innocence Resolutions and their accompanying Reports are available at http://www.abanet.org/crimjust/news/home.html except for the August 2005 Report, by clicking on "Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process." The texts of the Resolutions are also reproduced in the Appendix to this brief. App. 1a-8a.

[7] The Biological Evidence Principles can also be found at http://www.abanet.org/crimjust/policy/cjpol.html#am00115.

Finally, over the past three years, the ABA has devoted significant effort to the study, formulation, and adoption of policies aimed directly at the now-recognized shortcomings of the criminal justice system in the context of "actual innocence" exonerations. To date, the ABA has adopted nine separate "Innocence Resolutions," addressing various issues now recognized as potential sources of erroneous convictions. App. 1a–8a.[8]

The ABA's interest here is to advise the Court of its efforts in this area, particularly because a number of its policies are relevant to issues or factors presented in Petitioner's case. The ABA's policy responses to shortcomings in various areas of the criminal justice system—shortcomings only recently recognized, but now well-acknowledged, sometimes lead to erroneous conviction of the innocent—are relevant to this Court's effort to elucidate standards for federal habeas petitioners who claim "actual innocence" based on such shortcomings. The same short-

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[8] In addition, at least two of the ABA's general Standards for Criminal Justice also bear consideration here. *See* nn.15, 25 *infra*. *See generally* ABA, *Standards for Criminal Justice* (2d ed. 1980, Supp. 1986) ("Standards"). As explained in the Introduction to the Prosecution Function and Defense Function Standards, the Standards are

> the result of careful drafting and meticulous and extensive review by representatives of all segments of the criminal Justice system: judges, prosecutors, private defense counsel, public defenders, court personnel, and academics active in criminal justice teaching and research. Circulation of the standards to a number of individuals with a wide range of outside expertise in criminal justice has also assured the consideration of a rich array of comment and criticism that has greatly strengthened the quality of the final product.

In light of this balanced and careful approach, this Court "long ha[s] referred to these ABA Standards as 'guides to determin[e] what is reasonable.'" *Rompilla* v. *Beard*, 125 S. Ct. 2456, 2467 (2005) (brackets and citations omitted).

The ABA's 1997 Death Penalty Moratorium policy is also relevant, as it recommends adherence to, *inter alia*, the 1990 Capital Habeas Litigation policies. App. 8a-9a.

comings that can lead to erroneous convictions are also likely to frustrate a convicted defendant's efforts to conclusively prove his "actual innocence" many years later. Thus, standards for federal habeas review that this Court develops and applies to innocence claims must be robust enough to ensure fair examination of precisely the types of constitutional shortcomings that may have compromised the Petitioner's ability to demonstrate innocence below, as well as at trial.

The ABA therefore respectfully submits this brief to advise the Court of its nine Innocence Resolutions, its Biological Evidence Principles, and its Capital Habeas Corpus Litigation policies. These materials support standards for "actual innocence" habeas corpus cases that are sufficiently robust to accommodate the various evidentiary and systemic shortcomings revealed by "actual innocence" cases—systemic shortcomings that were simply not well-appreciated at the time *Herrera* and *Schlup* were decided.

SUMMARY OF ARGUMENT

In the decade since this Court decided *Herrera* v. *Collins*, 506 U.S. 390 (1993), and *Schlup* v. *Delo*, 513 U.S. 298 (1995), the American Bar Association has undertaken substantial study of the issues relating to "actual innocence" claims. The ABA's work has confirmed now-well-acknowledged existence of serious shortcomings in the administration of the criminal justice system.

In an effort to remedy these shortcomings and to addresses the rapidly evolving landscape of DNA and biological evidence, the ABA adopted a series of policy responses and recommendations. Specifically, the ABA adopted:

1. "Principles Concerning Biological Evidence" (2000), which recommended (a) that such evidence be made available to defendants and convicted persons upon request and (b) that they "may seek appropriate relief notwithstanding any other provision of law" (App. 8a); and

2. Nine separate "Innocence Resolutions" (2004-2005) that make specific recommendations for addressing the sources of erroneous convictions, including, *inter alia*, false

confessions and mishandling of forensic evidence, in order to "reduce the risk of convicting the innocent while increasing the likelihood of convicting the guilty." *See, e.g.*, App. 1a.

These recommendations, along with the ABA's Capital Habeas Corpus Litigation Policies, which address specific circumstances that justify overlooking procedural bars to raising innocence claims, are important guideposts in the development of standards for adjudicating claims under *Schlup* and *Herrera*. They support adoption of standards that are sufficiently robust to accommodate shortcomings of the criminal justice system that sometime produce erroneous convictions of persons who are actually innocent.

ARGUMENT

ABA Policies Support The Formulation And Application Of Robust Actual Innocence Standards In Capital Habeas Corpus Proceedings

As the United States Senate reported in 2002, "[r]ecent exonerations of inmates awaiting capital punishment or serving lengthy prison sentences have cast doubt on the reliability of the criminal justice system." S. Rep. No. 107-315, at 7 (2002) (accompanying the Innocence Protection Act, subsequently enacted as part of the Justice for All Act of 2004, Pub. L. No. 108-405 (2004), and codified at 18 U.S.C. § 3600 *et seq.*) ("Senate Report"). These exonerations have demonstrated, as Justice O'Connor has observed, that "the system may well be allowing some innocent defendants to be executed." 2001 Address to Minnesota Women Lawyers Association, *quoted in* Senate Report 7. Because the punishment of those who are actually innocent impairs the administration of justice and corrodes public confidence in the criminal justice system, the ABA has devoted substantial resources to studying issues related to actual innocence (in both capital and non-capital contexts) since the late 1990s.[9]

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[9] The 2002 Senate Report on the Innocence Protection Act specifically referenced ABA standards in addressing these issues. Senate Report 25.

A number of the resulting policies adopted by the ABA as a whole are relevant to this Court's efforts to formulate and apply standards for review of *Schlup* or *Hererra* "actual innocence" claims.

1. Biological Evidence Principles. "Three developments in the 1990s dramatically altered the judicial approach to scientific evidence." ABA Report, *Crime Laboratories and Forensic Evidence*, No. 111B, at 2 (Aug. 2004). First, the advent of more precise DNA profiling "revolutionized forensic science." *Id.*[10] Second, this Court's triumvirate of evidentiary decisions "revolutionized the admissibility of evidence based on forensic science." *Id.* at 3.[11] And third, forensic "abuse" cases involving hair sampling and pre-DNA serological evidence led to "nationwide criticism of forensic evidence in general." *Id.* at 5 (quoting *Ramirez* v. *State*, 810 So. 2d 836, 853 (Fla. 2001)).[12]

These developments led the ABA in 2000 to adopt a set of "Principles Concerning Biological Evidence." These principles recommend that "[a]ll biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of law." App. 8a.

The revolution in DNA testing was in its infancy in the early 1990s, when this Court's opinions in *Herrera* and

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[10] *See, e.g.*, *Harvey*, 285 F.3d at 306 (separate opinion of Luttig, J., discussing these "singularly significant developments").

[11] *See Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999); *General Elec. Co.* v. *Joiner*, 522 U.S. 136 (1997); *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

[12] Notably, Petitioner's case involves these very factors: (1) new DNA testing, not available at the time of his state-court proceedings, that proves that semen on the victim's nightgown was not his and (2) now-undisputed mishandling of the victim's serological (blood) evidence (albeit the timing of the mishandling remains disputed).

Schlup were handed down.[13] Only in 2000 did the ABA first formally recognize "the need to study the apparently emerging instances of convicted persons who are exonerated by DNA and other biological evidence." ABA Report 115, *supra*, at 2.[14] That Report noted that "DNA testing has been made widely available" only in "the [past] seven years." *Id.* at 3. Explaining that "[w]ith the recent development of DNA testing, ... science presents an opportunity to both improve the reliability of the criminal justice system, and to reveal the errors of the past," the Report recommended that DNA and other biological evidence be permitted to be raised in challenge to convictions *"no matter when such evidence is discovered,"* in order to "ensure the equitable dispensation of justice." *Id.* at 1, 4 (emphasis added).[15]

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[13] As a United States Department of Justice report recognized in 1999, DNA exonerations have changed the perspective on which *Herrera* (and, we would add, *Schlup*) was based: the notion that "there is [with the passage of time] no guarantee that the guilt or innocence determination would be any more exact." *Herrera*, 506 U.S. at 403. Rather than "the passage of time only diminish[ing] the reliability of" criminal guilt/innocence evidence (*id.*), "[t]o the contrary, the probative value of DNA testing has been steadily increasing." Nat'l Inst. of Justice, U.S. Dep't of Justice, *Postconviction DNA Testing: Recommendations for Handling Requests* 9-10 (NIJ 177626, Sept. 1999). Thus, this NIJ Report concluded, "[t]he strong presumption that verdicts are correct, one of the underpinnings of restrictions on postconviction relief, has been weakened by the growing number of convictions that have been vacated because of exclusionary DNA test results." *Id.* at 10.

[14] The accompanying Report can be found at ABA, *Reports with Recommendations to the House of Delegates*, ABA Annual Meeting, New York, New York, July 10-11, 2000 (2002).

[15] Congress took the same view in the 2004 Innocence Protection Act: "[I]f DNA test results ... exclude the applicant as the source of the DNA evidence," a defendant must be permitted to file a motion for new trial or resentencing "[n]otwithstanding any law that would bar [such] a motion ... as untimely." H.R. 5107, § 411, *codified at* 18 U.S.C. § 3600(g)(1).

Similarly, Criminal Justice Standard for Post-Conviction Relief 22-2.1 provides in relevant part that "A post-conviction proceeding should be sufficiently broad to provide relief: (a) for meritorious claims ... (v) that there exists evidence of material facts which were not, and in the exercise

This ABA policy supports the principle that courts should be empowered to overlook procedural bars when material DNA or other scientific evidence that could not have been offered at the time of conviction is proffered in support of an innocence claim. Standards that this Court develops in furtherance of *Herrera* and *Schlup* should be sufficiently robust to accommodate advances in our understanding of biological evidence and its abuses.

2. **The Innocence Resolutions.** Although the revolution in forensic DNA analysis provided the initial stimulus for many "actual innocence" cases, the systemic shortcomings of the criminal justice system that have sometimes led to erroneous convictions are not limited to flaws in forensic evidence, and they cannot always be corrected simply by new scientific testing.[16] To study issues beyond DNA, the ABA formed an Ad Hoc Committee to Ensure the Integrity of the Criminal Process, in order to recommend policies that could address other flaws in the criminal justice system that have produced the conviction of actually-innocent defendants.

The result has been a series of nine separate Innocence Resolutions adopted by the ABA's House of Delegates between February 2004 and August 2005. The primary goal as stated in many of the Resolutions is "to reduce the risk of

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of due diligence could not have been, theretofore presented ... and that now require vacation of the conviction or sentence." App. 13a-14a.

[16] Senate Report 20-21 ("The root causes of wrongful convictions are varied. They include flaws in eyewitness identification procedures, undue reliance on jailhouse informants, police misconduct and prosecutorial misconduct.... DNA testing ... is not a comprehensive solution .... Instead, the causes of wrongful convictions must be addressed directly.") Consequently, the Justice for All Act of 2004 addressed not only DNA evidence, but also related topics, such as funding and standards for crime laboratories, providing incentives for States to consider innocence claims, and adequate funding for competent capital defense counsel. *See* H.R. 5107, Sec. 1 (Table of Contents); *accord*, Samuel R. Gross et al., *Exonerations in the United States, 1989-2003*, 95 J. Crim. L. & Criminology 523, 524 (2005) (noting that out of 340 exonerations, 144 resulted from DNA evidence, and 196 by evidence of other problems).

convicting the innocent, while increasing the likelihood of convicting the guilty." App. 1a-4a, 6a. This latter point is critical: for every innocent person left imprisoned, a guilty one remains at large, and attention paid to non-frivolous innocence claims can benefit interests of the prosecution, defendants, and the general public. In innocence cases, the actual perpetrators are often identified in the process of exoneration, thereby serving the interests of justice and benefiting public safety.[17] As Congress recognized in entitling the Justice for All Act, ensuring avenues for the exoneration of innocent persons benefits all involved in the criminal justice system. *Accord*, Senate Report 1 ("The purpose of the Innocence Protection Act . . . is to help reduce the risk both that innocent persons will be put to death and that those guilty of violent crimes will remain at large."); H.R. Rep. No. 108-711 (2004), *reprinted in* 2005 U.S.C.C.A.N 2274, at 2278 (noting that encouraging accurate DNA testing and competent defense counsel "is the best way to ensure that the right person is convicted" as well as "prevent[ing] wrongful convictions").

The Innocence Resolutions address a number of now-recognized sources of erroneous convictions, and the ABA urges the Court to examine the Resolutions and the Reports that accompany them in full.[18] They bear directly on issues

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[17] For example, in this case, Petitioner's DNA evidence not only proved that it was not his semen on the victim's nightgown; it also proved that the semen was the victim's husband's. Investigatory resources were then redirected toward the husband, resulting in discovery of additional evidence exculpatory of House and inculpatory of the husband. *See House* v. *Bell*, 386 F.3d 668, 686-687 (6th Cir. 2004) (Merritt, J., dissenting). The husband, however, has never been prosecuted or charged.

[18] The complete texts of these Resolutions are reproduced in the Appendix. App. 1a-8a. Their accompanying Reports (which do not represent adopted ABA policy, but were before the House of Delegates when the policies were adopted and may help explain their rationale) can be found on the ABA's website at http://www.abanet.org/crimjust/news/home.html under "Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process."

presented by Petitioner's case and place consideration of *Herrera* and *Schlup* within the contemporary understanding of factors that lead to valid innocence claims and exonerations. In addition to the new DNA evidence in this case (evidence that apparently disproves a central prosecution claim for both conviction and the death penalty) other factors addressed by the ABA's Innocence Resolutions are also present in Petitioner's case. Relevant excerpts include:

A. From *"Crime Laboratories and Forensic Evidence"* (App. 1a-2a): "[T]o reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty . . . , (1) . . . procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence. . . . (3) The appointment of defense experts for indigent defendants should be required whenever reasonably necessary to the defense. . . . (5) Counsel should have competence in the relevant area or consult with those who do where forensic evidence is essential in a case."

As the accompanying Report explained (at 2), although it seems "astounding[,] . . . a *third* of [exoneration] cases involved 'tainted or fraudulent science.'" The Report also concluded (at 13) that "incompetence of counsel cases involving scientific evidence are not hard to find."

In his federal habeas proceeding, Petitioner demonstrated to the satisfaction of all the judges that faulty forensic handling of the victim's blood samples—evidence that was central to the prosecution's case—occurred before trial. 386 F.3d at 682, 685. In addition, Petitioner complains of the "scientific" testimony the prosecution relied upon to argue that the semen on the victim's nightgown was Petitioner's—an argument now proven false by DNA analysis. *See id.* at 685. Compliance with the ABA's recommendations could well have avoided these flaws.

B. From *"Investigative Policies and Personnel"* (App. 3a): All jurisdictions should "[e]stablish and enforce written procedures and policies governing the collection and preservation of evidence and other aspects of the conduct of criminal investigations" and "[e]stablish adequate opportunity for

citizens and investigative personnel to report misconduct in investigations."

As the accompanying Report noted (at 2), "[t]he quality of a criminal investigation and prosecution turns on the actions of the law enforcement personnel." Moreover, "complaints and comments [about an investigation] should be taken seriously by the officials . . . because misconduct could lead to the conviction of an innocent person or the escape of a guilty party." *Id.* at 5.

Again, Petitioner has raised serious questions about the collection, handling, and preservation of the blood evidence and his blue jeans, a central link in the prosecution's case. 386 F.3d at 680-681. Additionally, Petitioner produced a witness who testified that she tried unsuccessfully to report to officials about a confession to the crime she had heard from the victim's husband. *Id.* at 683. The ABA Resolution indicates that concerns about these areas are not unwarranted.

C. From *"Prosecution Practices"* (App. 4a): "[T]o reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, . . . [jurisdictions should] (3) ensure that law enforcement agencies, laboratories and other experts understand their obligations to inform prosecutors about exculpatory or mitigating evidence."

The accompanying Report noted (at 2-3) "the integral role prosecutors play to ensure that fair process is followed" and emphasizes that "prosecutors should establish guidelines and procedures" not only for "turning *Brady* evidence over to the defense," but also for "receiving that information from its partners and agents including police department and laboratories."

Petitioner's evidence regarding the mishandling of the blood samples in his case suggests that agents of the prosecution possessed potentially exculpatory evidence that was not disclosed to Petitioner pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny.

The Report accompanying this Resolution also noted (at 5) that "among the many factors that lead to the wrongful conviction of the innocent, eyewitness testimony and confessions were the most problematic." In the federal evidentiary hearing below, the eyewitness conceded that his trial testimony had been inaccurate, and Petitioner's evidence challenging the eyewitness testimony that placed him near the scene where the body was found was sufficient to lead the majority to question it. 386 F.3d at 679 (positing "even if we accept [the] contention that" the eyewitness testimony was false). Conditions that might explain Petitioner's initial, false statements to investigators were also presented below. The ABA's study of such factors is relevant to this Court's consideration of how such evidence should be evaluated under *Schlup* and *Herrera*.[19]

D. From *"Defense Counsel Practices"* (App. 6a-7a): Jurisdictions should "establish[] standards of practice for defense counsel in serious non-capital criminal cases that: ... (5) require defense counsel to investigate circumstances indicating innocence regardless of ... facts constituting guilt ...."

As the accompanying Report noted (at 3), "the role of defense counsel is critical" to ensure that the guilty are accurately convicted and the innocent are not. Because the ABA has adopted elsewhere "Guidelines for the ... Performance of Defense Counsel in Death Penalty Cases," *see Rompilla* v. *Beard*, 125 S. Ct. 2456, 2466 n.7 (2005) (citing these ABA Guidelines with approval), the Innocence Resolution on this topic addresses only other "serious criminal cases." Report at 4. This Court has also recognized that in-

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[19] In this regard, two of the ABA's Resolutions deal directly, and at length, with improvements that ought to be made in the contexts of eyewitness identification and interrogations. App. 1a, 2a-3a. While not directly relevant to Petitioner's case, these Resolutions and their accompanying Reports are relevant to this Court's consideration of the general category of actual innocence cases, as these two areas were identified in the Prosecution Policies Report (at 5) as the "most problematic" of all.

effective investigation by defense counsel can give rise to a Sixth Amendment violation regarding "penalty innocence" as well as innocence of the crime. *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003) (citing ABA guidelines). The ABA's Innocence Resolution Report on this topic (at 9) "concluded that establishing, implementing, and enforcing heightened standards for such defense counsel would tend to avoid instances of the innocent being wrongly convicted."

Petitioner seeks to demonstrate that he was denied the effective assistance of counsel—provided the *Schlup* "gateway" can be crossed. As just one example of the constitutional inadequacy of his counsel, Petitioner pointed out that no fewer than *five* exculpatory witnesses (*see* 386 F.3d at 686-687) were located ten years later—two of whom testified without obvious bias to having heard a contemporaneous confession to the crime by someone other than Petitioner.[20]

The ABA's Innocence Resolutions underscore the compelling need for *courts* to examine the merits of claims presented by potentially innocent persons, for two additional reasons.

First, the recommended policies have not yet been adopted, let alone implemented, in many jurisdictions. They certainly were not in place a decade ago or more, when many defendants with highly plausible claims of innocence (including Petitioner) were convicted. Thus, the flaws observed by Congress in connection with the Innocence Protection Act, and by the ABA in the work described above, are likely to

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[20] Another Resolution, "*Systemic Remedies*" (App. 7a-8a), "urges federal, state and territorial governments to identify and attempt to eliminate the causes of erroneous convictions." The accompanying Report states (at 3) that "[i]t is time to adopt an explicit innocence exception to current bars to obtaining habeas review." This Resolution simply underscores the fact that there are other systemic flaws in the criminal justice system that need to be addressed at fundamental levels, if erroneous convictions are to be avoided. The ABA is continuing to study these flaws, and further development of bipartisan policies is anticipated.

be pervasive and difficult to prove in the habeas context for some time to come.

Second, and as a direct consequence of the first point, in many cases the very evidence that could conclusively exonerate an individual has been lost precisely because of the identified problems, such as: the failure of defense counsel to conduct a timely or thorough investigation, the loss or contamination of evidence due to faulty law enforcement and forensic guidelines and techniques, and the failure to provide all exculpatory evidence at the time of trial.

During the necessarily cautious process of studying and accepting improvements to the criminal justice system designed to prevent erroneous convictions, federal habeas courts will necessarily be asked to act as protectors of those who may be actually innocent. If federal courts are to assure that only culpable defendants are punished, this Court must set standards that allow for the possibility that a defendant with a colorable claim of innocence may be unable to produce evidence that would satisfy the extremely exacting standard adopted by the *en banc* majority in this case precisely *because* of the systemic shortcomings that led to their erroneous conviction in the first place. The Court should therefore adopt a sufficiently robust standard of review to permit full examination of such claims. The standard should acknowledge that the same flaws that can lead to erroneous convictions can also lead to shortcomings in proof years later. Otherwise, potentially innocent defendants will be denied review of the very defects in the system that initially violated their rights and led to an unjust result.

3. **Capital Habeas Corpus Litigation Policies.** In 1988 the ABA formed a Task Force to comprehensively study capital cases in the context of federal habeas corpus review. *See* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases* (ABA 1990), *reprinted in* 40 Am. U.L. Rev. 1, 13 (1990) ("A Report Containing the American Bar Association's Recommendations Concerning Death Penalty Habeas Corpus") ("1990 Report"). The Task Force, comprised of state and federal

judges, prosecutors and defense counsel, court administrators, and academics, proposed, and the ABA adopted, policies addressing the handling of federal habeas corpus petitions in the capital context. *Id.* at 9-12; App. 9a-12a. The purpose of the policies is to "enhance both the efficiency and the fairness of state and federal review procedures." 40 Am. U.L. Rev. at 13.

Two paragraphs of the ABA's Capital Habeas Corpus Litigation policies are particularly relevant to the question when to allow federal courts to overlook procedural bars in order to examine constitutional claims in the innocence context.

First, paragraph 13 (App. 11a-12a), which recommended a "one-year limitations period" for federal habeas petitions, expressly provides that such "time requirements should be waived where the petitioner has presented a colorable claim, which has not been presented previously, either of factual innocence or of the petitioner's ineligibility for the death penalty" (App. 12a).

The ABA borrowed this "colorable claim" of innocence standard directly from this Court's then-most recent decision on point, *Kuhlman* v. *Wilson*, 477 U.S. 436, 454 (1986). The *Kuhlman* Court had expressly "adopt[ed]" a "colorable claim of factual innocence ... standard" to define when an otherwise-applicable procedural bar to federal habeas review should be overlooked to satisfy the "ends of justice" exception previously expressed in *Sanders* v. *United States*, 373 U.S. 1 (1963). *See* 477 U.S. at 444-445, 454.[21]

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[21] The *Kuhlman* Court noted (477 U.S. at 454) that it was borrowing its "colorable showing" language from Judge Henry Friendly's famous article, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 146-148 (1970).

Because three other Justices would have adopted an even more forgiving standard, "colorable claim" represented the maximum standard for actual innocence habeas claims, agreed upon without dissent by at least seven members of this Court. *See* 477 U.S. at 454 (Powell, J., joined by Burger, CJ., and Rehnquist & O'Connor, JJ.) ("colorable showing ... col-

Five years after the ABA adopted paragraph 13, this Court endorsed the "colorable claim of factual innocence" standard from *Kuhlman* in *Schlup* v. *Delo*, 513 U.S. at 322. The Court noted (*id.*) that in *Kuhlman* it had "elaborated" that this phrase represented a "fair probability" standard or, in other words, a "probably" standard as explained in *Murray* v. *Carrier*, 477 U.S. 478 (1986) (decided the same day as *Kuhlman*). In adopting this "colorable claim, fair probability" standard for actual innocence "gateway" claims, *Schlup* expressly rejected a more stringent "clear and convincing" standard that had been suggested in a prior case (*Sawyer* v. *Whitley*, 505 U.S. 333 (1992)). 513 U.S. at 323, 326-327.[22] The *Schlup* Court explained that actual innocence represents a "miscarriage of justice" exception to normal habeas corpus cause-and-prejudice rules, and that its choice of a "colorable claim ... probability" standard represented "less of a threat to scarce judicial resources and to principles of finality and comity" in the actual innocence context. *Id.* at 322, 324. Meanwhile, the "individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent." *Id.* at 324-325. Thus a "somewhat less exacting standard of proof" is appropriate." *Id.* at 325.

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orable claim of factual innocence"); *id.* at 476 (Stevens, J., dissenting) ("colorable claim of innocence"); *id.* at 466 (Brennan, J., dissenting, joined by Marshall, J.) (arguing that colorable claim of innocence is too narrow a standard). Chief Justice Burger and Justice White did not join the "colorable claim" portion of Justice Powell's opinion, nor did they explain why.

[22] *Schlup* noted that *Sawyer* had adopted a "clear and convincing" standard for death penalty-innocence cases, as distinguished from claims of innocence of the underlying crime. 513 U.S. at 323. To this extent, *Sawyer* has rejected the ABA's 1990 policy recommendation in paragraph 13 of a "colorable claim" standard for penalty-ineligibility. It would not be unreasonable, however, to revisit this stringent standard for penalty-innocence claims in light of the dramatically changed landscape of "actual innocence" exonerations which was simply not appreciated at the time of *Sawyer*.

Second, paragraph 14 of the ABA's 1990 policy (App. at 12a) also speaks to when a court should overlook a procedural bar in the face of an actual innocence claim. Paragraph 14 recommends that the procedural bar to *successive* habeas petitions (which the petition in this case is not) should not be applied if a petitioner advances "facts ... sufficient ... to undermine the court's confidence in the jury's determination of guilt on the offense." Virtually identical language was employed subsequently in *Schlup*, where the Court explained that a habeas petitioner could get through the "gateway" if his "new facts raised sufficient doubt about guilt to undermine confidence in the result of the trial." 513 U.S. at 317. There is no indication that the ABA in 1990—or this Court five years later in *Schlup*—perceived any substantive difference between this phrasing and the "colorable claim" language employed elsewhere in both *Schlup* and the 1990 policy. It is simply another way of describing the standard of proof for an innocence claim in the death penalty habeas context.[23]

While the ABA does not recommend a particular standard of review for this Court, it urges the Court to adopt a standard that is robust enough to fairly evaluate nonfrivolous claims of innocence on their merits. The standard should be informed by the fact that conclusive proof of innocence may itself be hamstrung by the very flaws that led to the claimed erroneous conviction. A standard consistent with the policies advanced by in paragraphs 13 and 14 of the 1990 Capital Habeas Corpus Litigation policies would promote this goal.

As Justice Stevens explained for the Court in *Schlup*, innocence claims that actually meet the standard will be "rare"—yet the "compelling" interest "in avoiding injustice" will be met by not rejecting claims that show a probability of innocence. 513 U.S. at 321, 324. The standards adopted and

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[23] In 1997, after *Schlup* was decided, the ABA endorsed the 1990 policies when it adopted its Death Penalty Moratorium resolution. App. 8a-9a.

applied by this Court for modern-day innocence claims should fairly accommodate the dramatically changed criminal justice landscape revealed by recent "actual innocence" exonerations—a pattern of exonerations that was simply not appreciated at the time of *Herrera*, *Sawyer*, or *Schlup*.[24]

CONCLUSION

This Court should take into account the dramatically changed legal and factual landscape resulting from innocence exonerations that have become increasingly frequent in recent years in formulating and applying evidentiary standards for actual innocence claims. A robust standard should be adopted—one that acknowledges that new DNA testing may not have been available at the time of many state-court proceedings and that allows for the possibility that the very flaws that lead to erroneous convictions can also lead to shortcomings of proof subsequently in habeas proceedings. The ABA's Innocence Resolutions, Biological Evidence Principles, and 1990 Capital Habeas Corpus Litigation policies should be considered in this regard.

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[24] *See* 513 U.S. at 321-322 & n.36 (noting that no party had cited a proven "actual innocence" case and that, at that time (1995), the Court itself could find only two such decisions, indicating that valid actual innocence cases are "rare" and "extraordinary"). In addition to the path-breaking 1996 NIJ report *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (Dep't of Justice 1996), *available at* http://www.ncjrs.org/pdffiles/dnaevid.pdf, popular understanding and acceptance of the actual innocence phenomenon can be traced to James S. Leibman *et al.*, *A Broken System: Error Rates in Capital Cases, 1973-1995*" (Columbia University, 2000), *available at* http://ccjr.policy.net/proactive/newsroom/release.vtml?id=18200 and Barry Scheck, Peter Neufield & Jim Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongfully Convicted* (2000). Thus, the Death Penalty Information Center reports that the rate of death penalty exonerations almost tripled only recently, in the six-year period from 1998 to 2003. http://www.deathpenaltyinfo.org/article.php?did=412&scid=6. Today, while still uncommon, exonerations have become a well-recognized, if disturbing, facet of our criminal justice system.

Respectfully submitted,

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APPENDIX

AMERICAN BAR ASSOCIATION APPROVED INNOCENCE RESOLUTIONS, 2004-2005

MIDYEAR MEETING 2004

I. INTERROGATIONS:

RESOLVED, That the American Bar Association urges all law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, to audiotape the entirety of such custodial investigations.

FURTHER RESOLVED, That the American Bar Association urges legislatures and/or courts to enact laws or rules of procedure requiring videotaping of the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, to require the audiotaping of such custodial interrogations, to provide necessary funding, and to provide appropriate remedies for non-compliance.

Annual Meeting 2004

II. CRIME LABORATORIES AND FORENSIC EVIDENCE—111B (CJS):

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following principles:

1. Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.

2. Crime laboratories and medical examiner offices should be adequately funded.

3. The appointment of defense experts for indigent defendants should be required whenever reasonably necessary to the defense.

4. Training in forensic science for attorneys should be made available at minimal cost to ensure adequate representation for both the public and defendants.

5. Counsel should have competence in the relevant area or consult with those who do where forensic evidence is essential in a case.

III. EYEWITNESS IDENTIFICATION—111C (CJS):

RESOLVED, That the American Bar Association adopts the American Bar Association Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures dated August 2004.

FURTHER RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following principles:

1. Police and prosecutors craft detailed guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy;

2. Police and prosecutors receive periodic training on how to implement the above-referenced guidelines,

3. Police and prosecutors receive periodic training on non-suggestive techniques for interviewing witnesses;

4. Internal mechanisms be created within police departments and prosecutors' offices to periodically update such guidelines to incorporate advances in social scientific research and in the continuing lessons of practical experience; and

5. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the American Bar

Association Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures dated August 2004.

FURTHER RESOLVED, That the American Bar Association, to improve the ability of juries and judges to make fully informed trial decisions concerning the accuracy of eyewitness identifications, urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following principles:

1. Courts should have the discretion, where appropriate in an individual case, to allow a properly qualified expert to testify both pretrial and at trial on the factors affecting eyewitness accuracy; and

2. Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should consider exercising their discretion to use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging the accuracy of the identification.

IV. INVESTIGATIVE POLICIES AND PERSONNEL: (111E (CJS))

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following principles:

1. Establish and enforce written procedures and policies governing the collection and preservation of evidence and other aspects of the conduct of criminal investigations;

2. Establish training programs and disciplinary procedures to assure that investigative personnel are prepared and accountable for their performance;

3. Establish adequate opportunity for citizens and investigative personnel to report misconduct in investigations; and

4. Establish adequate funding for all of the above.

V. PROSECUTION PRACTICES (111F (CJS)):

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following principles:

1. Provide adequate funding to prosecutors' offices;

2. Establish standards to ensure that workloads of prosecutors are maintained at levels that allow them to provide competent legal representation;

3. Ensure that law enforcement agencies, laboratories and other experts understand their obligations to inform prosecutors about exculpatory or mitigating evidence;

4. Establish procedures for evaluating cases that rely upon eyewitness identification, confessions or testimony from witnesses that receive a benefit; and

5. Draft legislation to provide that material evidence be preserved for a reasonable period of time after criminal appeals are exhausted to permit post-conviction review.

MIDYEAR MEETING 2005

VI. COMPENSATION FOR THE WRONGFULLY CONVICTED (108A (CJS)):

RESOLVED, That the American Bar Association urges federal, state, local and territorial jurisdictions to enact statutes to adequately compensate persons who have been convicted and incarcerated for crimes they did not commit.

FURTHER RESOLVED, The American Bar Association urges jurisdictions to consider the following factors in drafting a compensation statute:

A. Conditions Precedent:

1. Statutes should require claimants to have been incarcerated as the result of a conviction.

2. Claimants must be able to show that their convictions were vacated or pardoned on a ground demonstrating actual innocence, which for this purpose re-

quires that the claimant did not commit the crime, or the crime did not occur.

3. The claimant's own misconduct should not have substantially contributed to the conviction. A false confession or guilty plea does not automatically bar recovery.

B. The size of the award:

1. The award should be in proportion to the time served;

2. The award should be based upon economic loss;

3. The award should include non-economic losses, such as pain and suffering, humiliation, loss of consortium, and loss of reputation; and

4. Claimants are eligible for compensation only if, but for this conviction, the claimant would not have been incarcerated. The government should have the burden of demonstrating that the claimant would have otherwise been incarcerated.

C. A successful claimant shall be entitled to receive reasonable attorneys fees in connection with establishing the claim of actual innocence.

D. Judgment should include relief from all governmental obligations incurred as a result of the trial, conviction and incarceration of the claimant, and restoration of all rights lost as a result thereof.

E. The court or executive authority that releases an individual based on actual innocence should give that person notice of the statutory compensation scheme.

1. Any suit must be brought within one year of notice.

2. If the claimant was not given notice, suit must be commenced within two years after exoneration is final or after the adoption of a compensation statute.

F. Jurisdictions should assist the innocent to reenter the community.

1. Assistance should be provided that is at least equivalent to that available to individuals on probation or parole.

2. The erroneous judgment of conviction should be expunged from the innocent's criminal record.

VII. JAILHOUSE INFORMANTS (108B (CJS)):

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by ensuring that no prosecution should occur based solely upon uncorroborated jailhouse informant testimony.

VIII. DEFENSE COUNSEL PRACTICES (108C CJS)):

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent by establishing standards of practice for defense counsel in serious non-capital criminal cases that:

1. Formalize the means for providing appropriately experienced and qualified appointed or assigned defense counsel in serious criminal cases, modeled after the means prescribed in Standards 5-1.2 and 5-1.3 of the ABA Standards for Criminal Justice Providing Defense Services and in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, by:

a) Adopting and implementing a Criminal Defense Plan to be administered by a Responsible Agency, which is either a defender organization or an independent authority; and

b) Authorizing the Responsible Agency to establish and publish recommended standards for defense representation, including knowledge, training, and experience in the defense of serious criminal cases, and using as a guide the requirements enumerated in Standard 5-2.2 of the ABA Standards for Criminal Justice Providing Defense Services:

2. Ensure that the workloads of defense counsel be maintained at levels that enable them to provide the level of representation recommended by the Criminal Defense Plan, using as a guide he requirements enumerated in Standard 5-5.3 of the ABA Standards for Criminal Justice Providing Defense Services;

3. Ensure that defense counsel are compensated at rates no less than comparable prosecutors and that other defense team members are compensated at rates no less than comparable professionals in the private sector; using as a guide the requirements enumerated in Standard 5-2.4 of the ABA Standards for Criminal Justice Providing Defense Services;

4. Ensure that defense counsel have adequate resources and training to fulfill their obligation to conduct thorough and independent investigation into their clients' guilt or innocence in every case, including heightened scrutiny into cases that rely on eye-witness identification, witnesses who receive any benefit in return for their testimony, and confessions by youthful or mentally limited defendants;

5. Require defense counsel to investigate circumstances indicating innocence regardless of the client's admissions or statements of facts constituting guilt or the client's stated desire to plead guilty or dispose of the case without trial;

6. Require that defense counsel cooperate fully with successor counsel, including the preservation and transfer of all pertinent records and information;

7. Require defense counsel in all cases, whether or not serious criminal cases, to meet the requirements enumerated in the ABA Standards for Criminal Justice Providing Defense Services.

ANNUAL MEETING 2005

IX. SYSTEMIC REMEDIES (115A (CJS)):

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to identify and attempt to eliminate the causes of erroneous convictions.

FURTHER RESOLVED, That the American Bar Association urges state and local bar associations to assist in the effort to identify and attempt to eliminate the causes of erroneous convictions.

AMERICAN BAR ASSOCIATION
BIOLOGICAL EVIDENCE PRINCIPLES
(ADOPTED AT THE 2000 ANNUAL MEETING)

RESOLVED, That the American Bar Association urges federal, state, local and territorial jurisdictions to adhere to the following Principles concerning Biological Evidence collected in conjunction with the investigation of a criminal case:

1. All biological evidence should be preserved.

2. All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of law.

3. All necessary funding to accomplish these principles should be provided.

4. Appropriate scientific and privacy standards should be developed to guide the preservation of biological evidence.

AMERICAN BAR ASSOCIATION
DEATH PENALTY MORATORIUM POLICY
(ADOPTED AT THE 1997 MIDYEAR MEETING)

#107

RESOLVED, That the American Bar Association calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with the following longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed:

(i) Implementing ABA "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" (adopted Feb. 1989) and Association policies intended to encourage competence of counsel in capital cases (adopted Feb. 1979, Feb. 1988, Feb. 1990, Aug. 1996);

(ii) Preserving, enhancing, and streamlining state and federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims in state post-conviction and federal habeas corpus proceedings (adopted Aug. 1982, Feb. 1990);

(iii) Striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant (adopted Aug. 1988, Aug. 1991); and

(iv) Preventing execution of mentally retarded persons (adopted Feb. 1989) and persons who sere under the age of 18 at the time of their offenses (adopted Aug. 1983).

FURTHER RESOLVED, That in adopting this recommendation, apart from existing Association policies relating to offenders who are mentally retarded or under the age of 18 at the time of the commission of the offense, the Association takes no position on the death penalty.

AMERICAN BAR ASSOCIATION
DEATH PENALTY HABEAS CORPUS LITIGATION POLICIES (ADOPTED AT THE 1990 MIDYEAR MEETING, AND RETAINED AT THE 2000 ANNUAL MEETING)

115E (CJS)

BE IT RESOLVED, That the American Bar Association urges that the following measures be taken in the litigation of death penalty cases:

1) Because many of the defects and delays in habeas corpus procedure are due to the fact that the accused was not represented by competent counsel, particularly at the trial level, the state and federal governments should be obligated to provide competent and adequately compensated counsel for capital defendants / appellants / petitioners, as well as to provide sufficient resources for investigation, ex-

pert witnesses, and other services, at all stages of capital punishment litigation. The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases should govern the appointment and compensation of counsel.

2) The individual or organization responsible for appointing counsel should enlist the assistance of the local bar association and resource center to seek the best qualified attorneys available.

3) Jurisdictions that have the death penalty should establish and fund organizations to recruit, select, train, monitor, support, and assist attorneys involved at all stages of capital litigation and, if necessary, to participate in the trial of such cases.

4) New counsel should be appointed to represent the death-sentenced inmate for the state direct appeal unless the appellant requests the continuation of trial counsel after having been fully advised of the consequences of his or her decision, and the appellant waives the right to new counsel on the record.

5) To avoid the delay occasioned by the appointment of new counsel for post-conviction proceedings and to assure continued competent representation, state appellate counsel who represented a death-sentenced inmate should continue representation through all subsequent state, federal, and United States Supreme Court proceedings.

6) To assure that the state provides competent representation and to avoid procedural delays as well as multiple review of the same issues, the following procedural barriers to federal habeas corpus review should not apply with respect to any state court proceeding at which the state court, in deprivation of the right to counsel recognized in paragraph "1" above, failed to appoint competent and adequately compensated counsel to represent the defendant/appellant/petitioner:

(a) exhaustion of state judicial remedies,

(b) procedural default rules; and

(c) the presumption of correctness of state court findings of fact.

7) Federal courts should not rely on state procedural bar rules to preclude consideration of the merits of a claim if the prisoner shows that the failure to raise the claim in a state court was due to the ignorance or neglect of the prisoner or counsel or if the failure to consider such a claim would result in a miscarriage of justice.

8) State appellate courts should review under a knowing, understanding, and voluntary waiver standard all claims of constitutional error not properly raised at trial and on appeal and should have a plain error rule and apply it liberally with respect to errors of state law.

9) On the initial state post-conviction application, state post-conviction courts should review under a knowing, understanding, and voluntary waiver standard all claims of constitutional error not properly preserved at trial or on appeal.

10) The federal courts should adopt rules designed to facilitate both the presentation of all available claims in the first habeas corpus petition and the prompt exhaustion of any unexhausted claims in order to eliminate the problem of procedurally forced successive petitions.

11) A rational process of review will be facilitated by a stay of execution that remains in force until the completion of the initial round of state and federal post-conviction review. Therefore, unless the state courts grant a stay of execution, the federal courts, in preservation of their habeas corpus jurisdiction, should grant a stay of execution to run from the initiation of state post-conviction proceedings through the completion of the initial round of federal habeas corpus proceedings, and should be empowered to do so.

12) The petitioner should have a right of appeal from denial of an initial federal habeas corpus petition without the need to obtain a certificate of probable cause.

13) A one-year limitations period should be employed as a substitute mechanism to move the case toward reasonably

prompt completion, but only with adequate and sufficient tolling provisions to permit full and fair consideration of a petitioner's claims in state court, federal court, and the United States Supreme Court. The sanction for failure to comply with the time requirements should be dismissal, except that the time requirements should be waived where the petitioner has presented a colorable claim, which has not been presented previously, either of factual innocence or of the petitioner's ineligibility for the death penalty.

14) A federal court should entertain a second or successive petition for habeas corpus relief if:

(a) the request for relief is based on a claim not previously presented by the prisoner in the state and federal courts and the failure to raise the claim is the result of state action in violation of the Constitution or laws of the United States, the result of Supreme Court recognition of a new federal right that is retroactively applicable, or based on a factual predicate that could not have been discovered through the exercise of reasonable diligence; or

(b) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed; or

(c) consideration of the requested relief is necessary to prevent a miscarriage of justice.

15) The standard for determining whether changes in federal constitutional law should apply retroactively should be whether failure to apply the new law would undermine the accuracy of either the guilt or the sentencing determination.

16) To afford the states a reasonable time to adopt and implement rules and procedures pursuant to these recommendations, the proposed federal statutory and rule changes should take effect upon adoption by the states of provisions in accordance with these recommendations, but not later

than two years from the date of enactment of federal legislation; and

BE IT FURTHER RESOLVED, That the American Bar Association commends to Congress the sample legislation attached in Appendix "B" as a way to implement these Recommendations.

ABA CRIMINAL JUSTICE STANDARDS ON POST-CONVICTION REMEDIES (APPROVED AUGUST 1978)

Standard 22-2.1. Grounds for relief encompassed

A postconviction proceeding should be sufficiently broad to provide relief:

(a) for meritorious claims challenging judgments of conviction and sentence, including cognizable claims:

(i) that the conviction was obtained or sentence imposed in violation of the Constitution of the United States or the constitution or laws of the state in which the judgment was rendered;

(ii) that the applicant was convicted under a statute that is in violation of the Constitution of the United States or the constitution of the state in which judgment was rendered, or that the conduct for which the applicant was prosecuted is constitutionally protected;

(iii) that the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;

(iv) that the sentence imposed exceeded the maximum authorized by law or is otherwise not in accordance with the sentence authorized by law;

(v) that there exists evidence of material facts which were not, and in the exercise of due diligence could not have been, theretofore presented and heard in the proceedings leading to conviction and sentence, and that now require vacation of the conviction or sentence;

(vi) that there has been a significant change in law, whether substantive or procedural, applied in the process leading to applicant's conviction or sentence where sufficient reason exists to allow retroactive application of the changed legal standard;

(b) for meritorious claims challenging the legality of custody or restraint based upon a judgment of conviction, including claims that a sentence has been fully served or that there has been unlawful revocation of parole or probation or conditional release.

ABA CRIMINAL JUSTICE STANDARDS ON THE PROSECUTION FUNCTION (APPROVED FEBRUARY 1992)

Standard 3-1.2 The Function of the Prosecutor

(a) The office of prosecutor is charged with responsibility for prosecutions in its jurisdiction.

(b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.

(c) The duty of the prosecutor is to seek justice, not merely to convict.

(d) It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.

(e) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in standard 4-1.5.

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Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

PAUL GREGORY HOUSE, *Petitioner,*

v.

RICKY BELL, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE OF THE STATES OF CALIFORNIA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, KANSAS, LOUISIANA, MISSISSIPPI, MONTANA, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, AND WASHINGTON IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. May a federal habeas court adjudicate Petitioner's procedurally defaulted ineffective-assistance-of-counsel claim under the "actual innocence" exception announced in *Schlup v. Delo*, 513 U.S. 298 (1995) when the petitioners does no more than raise questions about the reliability of portions of trial testimony or the manner in which physical evidence was handled or analyzed?

2. May a federal habeas court grant Petitioner's petition based on his freestanding claim of actual innocence?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-8990

PAUL GREGORY HOUSE, *Petitioner,*

v.

RICKY BELL, *Respondent.*

INTEREST OF AMICI CURIAE

Amici curiae are responsible for enforcing their criminal laws and defending state court judgments. The amici states have an interest in the "sensitive, and, to say the least, troubling" issue of litigating claims of "actual innocence" in federal court. *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J. conc.). The states provide judicial and executive avenues to address innocence claims. They also have an interest in the integrity of their procedural rules. Few rulings would be more disruptive of our federalist system than to provide for federal habeas review of freestanding claims of actual innocence. *Id.* at 401 (Rehnquist, C.J.).

In light of the amici states' interest in the finality of their judgments and the comity between state and federal court systems, it is important for this Court to consider accurate information relevant to maintaining "society's high degree of confidence in its criminal trials. . . ." *Id.* at 420 (O'Connor, J. conc.). Accordingly, the states have a stake in correcting misconceptions about claims of death row exonerations. Amaici curiae submit this brief in support of the respondent in this case under this Court's Rule 37.4.

SUMMARY OF ARGUMENT

The "prototypical example of 'actual innocence' is . . . where the State has convicted the wrong person of the crime." *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992). Contrary to the arguments of petitioner and his amici, available evidence of instances of "actual innocence" in capital cases does not justify disrupting the "paramount" role of state criminal proceedings "for determining the guilt or innocence of the defendant" or expanding the traditional limits on "[f]ederal habeas review . . . to claims of constitutional violations occurring in the course of the underlying state criminal proceedings." *Herrera*, 506 U.S. at 416, 419. There is nothing new about claims that the criminal justice system is fallible.

Moreover, the "evidence" of exonerations of so-called "actually innocent" defendants sentenced to death is based on overly inclusive criteria, questionable methodology and irrelevant information. In particular, many of the examples cited in the studies relied upon by petitioner and his amici do not show that the "wrong person" was convicted and sentenced to death.

The list of allegedly innocent defendants maintained by the Death Penalty Information Center includes defendants who were acquitted or had their cases dismissed because the prosecution could not carry its burden of proving guilt beyond a reasonable doubt. Of course, that failure of proof does not mean that the prosecution charged the "wrong person." On some occasions, jurors in these cases have indicated that their verdicts were based on the burden of proof, not because they believed that the defendant was "actually innocent." In other cases there were actual findings that "actual innocence" was not proven. Other defendants were acquitted, but they were still physically involved in the murders charged or were the actual perpetrators. Allegedly exonerated defendants were acquitted because evidence of their guilt was excluded. In other cases, prosecution witnesses recanted testimony under questionable circumstances. When co-defendants are separately tried, evidence emerges that

indicates that an acquitted co-defendant was not "actually innocent."

Furthermore, many of these examples demonstrate the efficacy of our Constitution's currently existing "unparalleled protections against convicting the innocent." *Id.* at 420 (O'Connor, J. conc.). For instance, many defendants had their convictions reversed on direct review. Their subsequent acquittals or case dismissals demonstrate that the conventional review system has worked. These cases do not establish a necessity for increased intrusive federal review of state judgments. Other older cases of allegedly exonerated death row inmates are irrelevant because they were sentenced under unconstitutional statutes that lacked the procedural protections of today's death penalty statutes.

A criminal justice system based on "reasonable doubt" carries the inherent risk of mistake. Yet even under the most liberal estimate, the number of "actually innocent" defendants sentenced to death since the advent of modern death penalty jurisprudence in 1973 is slight - amounting to 1.6 percent of 7,529 death sentences. More likely, the true number is only half of one percent. An overwhelming number of these cases were resolved by state courts.

ARGUMENT

EVIDENCE OF ALLEGED DEATH ROW EXONERATIONS DOES NOT SUPPORT CREATING A FREESTANDING CLAIM OF "ACTUAL INNOCENCE" COGNIZABLE UNDER 28 U.S.C. § 2254 OR RELAXING THE "MISCARRIAGE OF JUSTICE" EXCEPTION TO THE PROCEDURAL DEFAULT RULE

Recently, the Second Circuit Court of Appeals placed the debate in context: "[T]he argument that innocent people may be executed - in small or large numbers - is not new; it has been central to the centuries-old debate over both the wisdom and the constitutionality of capital punishment. . . ." *United States v.*

Quinones, 313 F.3d 49, 63 (2d Cir. 2002) [hereafter *Quinones II*] *rev'g United States v. Quinones*, 205 F.Supp.2d 256 (S.D.N.Y. 2002) [herafter *Quinones I*] *cert. den. Quninones v. United States*, 540 U.S. 1051 (2003).

In this Court, the risk of executing actually innocent people played a role in its decision invalidating most extant death penalty statutes in *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J.), and in the Court's holdings that an "actual innocence" claim can excuse procedural defaults in habeas corpus cases. *Sawyer v. Whitley*, 505 U.S. 333 (1992); *Murray v. Carrier*, 477 U.S. 478 (1986).

The public has clearly expressed its view on the wisdom of capital punishment. Public sentiment has long supported—and continues to support—the death penalty even though the populace is aware that the criminal justice system is not foolproof.[1] In the few years between *Furman* and *Gregg v. Georgia*, 428 U.S. 153 (1976), thirty-five states enacted new death penalty statutes. *See Gregg*, at 179-80 (Opinion of Stewart, Powell, and Stevens, JJ.). Today, thirty-eight states and the federal government impose the death penalty for one or more especially heinous types of crime.

The constitutionality of the death penalty has not seriously been questioned by this Court for almost 30 years, and in 1993 this Court declined to hold that federal courts could entertain freestanding claims of actual innocence. *Herrera v. Collins*,

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1. Furthermore, the public has long understood that there is always an inherent risk that an innocent person could be convicted and sentenced to death. Gallup News Service, *Americans' Views of Death Penalty More Positive This Year* (May 19, 2005). "Most Americans believe that executions of innocent people are rare - two in three believe this has happened in 5% or fewer cases in the last five years, including one-third who say it has not happened at all. Only 6% believe it has happened in more than 20% of the cases - less than half the percentage who said this in 2003 (13%). Although 95% of the public believed that innocent people are sometimes sentenced to death, 69% of the public supported the death penalty." Harris Interactive Poll 2, *More Than Two-Thirds of Americans Continue to Support the Death Penalty*, January 7, 2004.

506 U.S. 390, 427 (1993) (O'Connor, J., concurring); *Townsend v. Sain*, 372 U.S. 293, 317 (1963); *Fielder v. Varner*, 379 F.3d 113, 122 (3d Cir. 2004).

In *Herrera*, the petitioner pointed out the obvious - that Constitutional protections "sometimes fail." 506 U.S. at 420 (O'Connor, J. conc.). The late Chief Justice Rehnquist noted the scholarly debate surrounding studies of cases of "actual innocence" or "mistaken convictions." *Id.* at 415 n.15. Since *Herrera*, the debate about "actual innocence" has continued. See J. Marquis, *The Myth of Innocence*, 95 J. Crim. L. & Criminology 501 (2005). Both petitioner and his amici now posit a "dramatically changed legal and factual landscape resulting from innocence exonerations that have become increasingly frequent. . . ." ABA Br. at 19. They suggest that "public confidence" in the criminal justice system needs to be restored. Former Prosecutors [FP] Br. at 8. The amici states submit that petitioner and his supporters overstate the situation.[2/]

Amici curiae do not claim that an innocent person has never been convicted and sentenced to death. This Court already recognizes the potential for fallibility. *Herrera*, 506 U.S. at 415. There is always a risk of convicting the "actually innocent," since our criminal justice system requires proof of guilt "beyond a reasonable doubt," not to an "absolute certainty." *Franklin v. Lynaugh*, 487 U.S. 164, 188 (1988) (O'Connor, J. concurring). Rather, amici will provide perspective on the misleading methodology, temporal irrelevance, and exaggerated rhetoric behind current claims relating to Death Row "exonerations."

A. The DPIC List Of "Actually Innocent" Death Row Inmates

The principal source of skepticism relating to "mistaken convictions" is the Death Penalty Information Center's running

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2. Even petitioner's amici concede that exonerations remain "uncommon." ABA AC at 19 fn.24.

total of "exonerees" entitled "Innocence-List of those Released from Death Row" [hereafter DPIC List].[3/] Pet. for Writ of Cert. at 33 n.19; ABA Br. at 19 n.24; FP Br. at 6. Currently, the DPIC List contains 122 "exonerated" defendants. The DPIC recently relied on its list to proclaim a capital punishment "crisis." DPIC, *Innocence and the Crisis in the American Death Penalty* (Sept. 2004).

Although there are other studies and lists relating to innocence,[4/] it is appropriate to focus on the DPIC List because it is concerned exclusively with capital cases since 1970. Most (though by no means all) capital cases tried since 1970 have been subject to the various procedural protections mandated by this Court's post-*Gregg* Eighth Amendment jurisprudence, and the DPIC list is the most prominent and frequently cited of the lists of allegedly innocent people.

DPIC derives its List from court opinions, the media, and conversations with participants. Although the List was commissioned by the House Subcommittee on Civil and Constitutional Rights in 1993, it traces its origins to the studies referenced in *Herrera supra*, 506 U.S. at 415 fn. 15 (citing Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21 (1987) [hereafter Stanford] and Markman & Cassell, *Protecting the Innocent: A Response to the*

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3. The list is located at the DPIC website: http://www.deathpenalty.info.org. The List's history and its criteria are explained on the DPIC's website. The referenced DPIC publications are also located at this website.

4. For instance, petitioner and his amici also cite Samuel Gross, *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523 (2004). This study relies substantially on the DPIC List although it does not agree with the DPIC List regarding all defendants. The study of reversal rates in capital cases conducted at Columbia University, of course, did not examine claims of "actual innocence." However, that study's own data confirms only a 7% innocence rate for cases retried after reversal. Liebman, Fagan, & West, *A Broken System: Error Rates in Capital Cases, 1973-1995* (June 12, 2000) at 6.

Bedau-Radelet Study, 41 Stan. L. Rev. 121 (1988). The Stanford study focused primarily on "wrong person" mistakes, cases in which the defendant was both legally and physically uninvolved. It excluded cases in which the defendant was acquitted on grounds of self-defense. The Stanford authors admitted that their study was not definitive and that their conclusions about innocence were based on their untested belief that a majority of neutral observers examining these cases would conclude the defendants named in their study were actually innocent. Stanford, *supra*, at 23-24, 45, 47-48, 74.[5/] The popular successor to the Stanford study is the book by the same authors entitled *In Spite of Innocence* (1992).

The most recent refinement of the Stanford study appears in Radelet, Lofquist & Bedau, *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. Cooley L. Rev. 907 (1996) [hereafter Cooley]. This article altered the criteria in the Stanford study. For instance, it included accomplices mistakenly convicted as actual perpetrators. More notably, Cooley "includ[ed] cases where juries have acquitted, or state appellate courts have vacated the convictions of defendants, because of doubts about their guilt (*even if we personally believe the evidence of innocence is relatively weak*)." Cooley, *supra*, at 914 (emphasis added). Regrettably, the Cooley article does not identify all of these "relatively weak" cases.

The DPIC List amalgamates the cases listed in these studies with other cases based on its own recently revised criteria:

> The definition of innocence that DPIC uses in placing defendants on the list is that they had been convicted and

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5. Ironically, the DPIC has now repudiated this "neutral observer" standard without acknowledging that it was originated by the Stanford study for cases now included on the DPIC List. See, *Innocence and the Crisis in the American Death Penalty, supra*.

> sentenced to death, and subsequently either a) their conviction was overturned and they were acquitted at a re-trial, or all charges were dropped; or b) they were given an absolute pardon by the governor based on new evidence of innocence.[6]

As will be shown below, these criteria do not accurately identify persons sentenced to death who are "actually innocent" of the underlying crime.

B. Shortcomings Of The Overly Inclusive DPIC List

"A prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime." *Sawyer,* 505 U.S. at 340); *Johnson v. Pinchak*, 392 F.3d 551, 564 (3d Cir. 2004). The DPIC List criteria quoted above have obvious shortcomings in terms of identifying the "actually innocent" because appellate reversals, acquittals on retrial, and prosecutorial dismissals are not conclusive evidence of innocence. Bedau & Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 Stan. L. Rev. 161, 162 (1988) [hereafter Stanford Reply]. The DPIC List is misleading for another reason: it includes defendants whose convictions were reversed due to legal insufficiency, not based on successful assertions to a judge or jury of actual innocence.

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6. Recently, due to this revision, the DPIC removed six defendants it had formerly classified as "exonerees," including Californians Jerry Bigelow and Patrick Croy. Both of these defendants had been listed on the DPIC List even though they were indisputably actual perpetrators or physically involved in the murders for which they had been sentenced to death. *Bigelow v. Superior Court (People)*, 208 Cal.App.3d 1127 (Cal.App. 1989); *People v. Croy*, 41 Cal.3d 1 (Cal. 1985).

1. Acquittals And Dismissals Do Not Mean "Actual Innocence"

When a jury acquits a defendant because the prosecution has not proven guilt beyond a reasonable doubt, that verdict does not mean that the defendant did not actually commit the crime, i.e., that the defendant is "actually innocent." *Dowling v. United States*, 493 U.S. 342, 249 (1990); *Graham v. City of Philadelphia*, 402 F.3d 139, 145 (3d Cir. 2005) ("[A]n acquittal (i.e., not guilty beyond a reasonable doubt) following a criminal trial is not ipso facto a finding of actual innocence"). Even an acquittal based on self defense represents no more than the jury's determination that there was a reasonable doubt about guilt, not that the defendant was "actually innocent." *Martin v. Ohio*, 480 U.S. 228, 233-34 (1987); *Beavers v. Saffle*, 216 F.3d 918 (10th Cir. 2000).

Implicit in the "reasonable doubt" standard, of course, is that a conviction does not require "absolute certainty" as to guilt. Equally implicit, however, is that many guilty defendants will be acquitted, rather than convicted, because the proof does not eliminate all "reasonable doubt." *Smith v. Balkcom*, 660 F.2d 573, 580 (5th Cir. 1981). A jury must acquit "someone who is probably guilty but whose guilt is not established beyond a reasonable doubt." *Gregg*, 428 U.S. at 225 (White, J. concurring). "It is important to preserve the distinction between acquittal and innocence, which is regularly obfuscated in news media headlines. When acquittal is interpreted as a finding of innocence, the public is led to believe that a guiltless person has been prosecuted for political or corrupt reasons." Schwartz, *"Innocence"-A Dialogue with Professor Sundby*, 41 Hast. L.J. 153, 154-155 (1989), *cited in* Bedau & Radelet, *The Execution of the Innocent*, 1998 Law & Contemporary Problems 105, 106 fn. 9.

In addition,"[p]rosecutors sometimes fail to retry the defendant after a reversal not because of doubt about the accused's guilt, much less because of belief that the defendant is innocent or that the defendant is not guilty 'beyond a

reasonable doubt,' but for reasons wholly unrelated to guilt or innocence...." *Ibid.* at 106.

2. Current Procedures Protect The Innocent

The DPIC List does not account for the Constitution's "unparalleled protections against convicting the innocent . . . ." and our "unique" system of dual review. *Herrera,* 506 U.S. at 420; Louis Powell, *Capital Punishment*, 102 Harv. L. Rev. 1035, 1045 (1989). At times, when convictions are reversed and errors are corrected on retrial, defendants are either acquitted or receive a sentence less than death. These are cases in which the "conventional system of appellate review worked." Marshall, *Do Exonerations Prove "The System Works?"* 86 Judicature 83, 88 (2002) [hereafter Marshall]. While the DPIC List includes such cases, they hardly testify to a "crisis" in the criminal justice system.[7]

3. The DPIC List Includes Defendants Who Obtained Relief On Purely Legal Grounds—Not "Actual Innocence"

Moreover, the DPIC List strays outside its own criteria. The List includes cases in which convictions were reversed due to legal insufficiency, not because of actual innocence. "Actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614 (1998); *United States v. Ramos*, 147 F.3d 281, 286 (3d Cir. 1998). Of course, if an appeals court reverses a conviction because the evidence of guilt was legally insufficient to prove guilt beyond a reasonable doubt, then the state cannot retry the defendant under the the Double Jeopardy Clause. *Burks v. United States*, 437 U.S. 1, 16-18 (1978). The prosecution gets no second

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7. The arbitrary time frame used by the DPIC in compiling its list is also misleading in terms of assessing our present system of capital adjudication. The List begins with defendants who were convicted under death penalty statutes that predate current death penalty jurisprudence.

chance, even if there is better evidence of guilt available. However, that does not mean that the defendant who is released is the "prototypical" example of "actual innocence."

Despite its sympathies, the federal district court in *Quinones* agreed that the DPIC List was overly-inclusive. *Quinones I,* 205 F.Supp. at 265. After examining at least 101 descriptions of the cases on the DPIC List at that time, the court applied an undefined "conservative criterion" to conclude that only 31of the defendants named on the DPIC List were "factually innocent." The court also speculated that eight other defendants had substantial arguments of innocence. *Id.* at 265 & fn. 11.

Nonetheless, the DPIC List creates the false impression that all 122 of the named defendants were the "prototypical" wrong persons. This has led to hyperbolic rhetoric reflected in the briefing in this case. For instance, "for every innocent person left imprisoned, a guilty one remains at large. . . ." ABA Amicus at 10. "And of course the State wins, too, when exonerations permit it to prosecute and punish the true perpetrators of crime." FP Amicus at 11.[8] Of course, it is not

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8. In other forums, the DPIC List is continually misinterpreted as meaning that the "wrong person" was convicted in every case: "When dozens of innocent people are being sentenced to death, and dozens of guilty people are working [walking] free because the State has convicted the wrong person, we must ask ourselves what went wrong in that trial process. . . ." 146 Cong. Rec. S4669-03, S4675 (6/7/00) (statement of Sen. Leahy). Similarly, "[t]here is one other thing we should keep in mind. If the wrong person is on death row for a murder, if somebody is convicted of a murder they did not commit, that means that the real murderer is still running loose. Maybe everybody can feel comfortable that we have locked up somebody for the murder, but if there is still a killer on the loose, everything has broken down. Not only is an innocent man on death row, but a guilty man is running free." 148 Cong. Rec. S889-02, S891 (2/15/02) (statement of Sen. Leahy). As explained in the text, the fact that a defendant is acquitted or a case is dismissed does not necessarily mean that a "guilty person" is still "walking free" or "running loose." As recently as 2004, information from the DPIC List and similar studies was still relied upon fallaciously to assert: "What's more, the conviction of these innocent people inflicted needless

true that simply because a defendant was acquitted on retrial or a case was dismissed that he or she was the "wrong person" and there is some other guilty perpetrator still roaming around. Rather, it may frequently mean that the prosecution simply cannot prove the guilt of the "right person." The DPIC List inexplicably ignores that distinction.

C. Individual Examples of DPIC List Shortcomings

The DPIC claims its list is based on objective criteria and that its critics use subjective judgment. First, it is not true that the DPIC List is wholly objective. Its roots are found in a study that reached its conclusions on the authors' untested belief that a majority of neutral observers examining these cases would conclude the defendants were actually innocent. Stanford, *supra,* at 23-24, 47-48, 74.

Second, objective criteria do not help to address the principal concern – whether the state has convicted the "wrong person." A fundamental precept of death penalty law is that each case should be an "individualized inquiry" into the circumstances of the offense and the offender. *McCleskey v. Kemp*, 481 U.S. 279, 303 (1987). Yet the DPIC List does not

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harm on the criminal justice system because every time an innocent person is convicted, that means the guilty person who committed the rape or the murder or the robbery has not been caught and is out committing other crimes." Prof. Samuel Gross, Univ. of Mich. Law School, NPR, 4/20/04, 2004 WL 56756464. Even in its most recent report, the DPIC cannot resist insinuating that its list demonstrates that the wrong person was convicted of the crime: "Besides the danger of establishing a class of individuals who are placed under permanent suspicion, the failure to acknowledge the innocence of those who have been exonerated retards the search for the real perpetrator." *Innocence & the Crisis in the American Death Penalty*, Pt. IV. Most recently, at the hearings on the confirmation of Judge John G. Roberts as Chief Justice of the United States, the 121 inmates then mentioned on the DPIC List were cited as "121 people who we know were sentenced to die for crimes they did not commit." Transcript, Senate Judiciary Committee Hearings on the President's Nomination of Judge John G. Roberts as Chief Justice of the United States, September 14, 2005 (remarks of Sen. Feingold).

honor this precept. Rather, it concludes that a defendant is "innocent" if he is not convicted in a retrial or the charges are dismissed by the prosecutor. These overinclusive, undiscriminating criteria are not supported by law or experience. They demonstrate that "a consistency produced by ignoring individual differences is a false consistency." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

Limitations of space preclude an in-depth critique of the DPIC List. However, it is sufficient to highlight examples of the cases the List cites to raise doubts about its overbroad methodology and questionable relevance. *Quinones I*, 205 F.Supp. at 265.[9]

1. The DPIC List Includes Defendant Who Are Not "Actually Innocent"

The most notorious example of a defendant on the DPIC List who is not "actually innocent" is **Jay C. Smith (48)**.[10] As a matter of Pennsylvania law, Smith escaped retrial for triple murder due to prosecutorial misconduct. However, when he sought damages for false imprisonment, the federal appeals court conclusively retorted, "Our confidence in Smith's convictions for the murder of Susan Reinert and her two children is not the least bit diminished . . . ." Yet Smith still remains on the DPIC List as an "exoneree." *Smith v. Holtz*, 210 F.3d 186 (3d Cir. 2000).

Smith's case is not unique. The prosecution did not retry **Jeremy Sheets (97)** because the Nebraska Supreme Court excluded key evidence. However, the Nebraska State Victims' Compensation Fund denied Sheets' request for compensation because the dismissal of his case was not based on innocence. Neb. Op. Att'y Gen. No. 01036, 2001 WL 1503144. The

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9. Amici utilize many of the same types of sources and information relied upon by the DPIC, including media accounts when necessary.

10. The parenthetical number refers to a defendant's numerical placement on the DPIC List as of November 16, 2005.

Eighth Circuit Court of Appeals dismissed Sheets' civil rights suit because there was no evidence that a witness who supplied incriminating evidence against Sheets was unreliable. *Sheets v. Butera*, 389 F.3d 772 (8th Cir. 2004).

Andrew Golden's (55) conviction was reversed because of legal insufficiency of the evidence, not "actual innocence": "The finger of suspicion points heavily at Golden. A reasonable juror could conclude that he more likely than not caused his wife's death." *Golden v. State*, 629 So.2d 109, 111 (Fla. 1993).

The appeals court reluctantly reversed **John C. Skelton's (42)** conviction. "Although the evidence against appellant leads to a strong suspicion or probability that appellant committed the capital offense, we cannot say that it excludes to a moral certainty every other reasonable hypothesis except appellant's guilt . . . Although this Court does not relish the thought of reversing the conviction in this heinous case and ordering an acquittal, because the evidence does not exclude every other reasonable hypothesis, we are compelled to do so." *Skelton v. State*, 795 S.W.2d 162, 168-69 (Tex.Crim.App. 1989).

Jimmy Lee Mathers (44) was released after his conviction was reversed by a sharply split Arizona Supreme Court for legal insufficiency of the evidence. The contrasting majority and dissenting opinions demonstrate that Mathers was not found "actually innocent." *State v. Mathers*, 796 P.2d 866 (Ariz. 1990).

The Florida Supreme Court explained that "evidence exists in this case to establish that **[Robert Hayes (71)]** committed this offense [rape-murder], physical evidence also exists to establish that someone other than Hayes committed the offense." *Hayes v. State*, 660 So.2d 257, 266 (Fla. 1995). The court excluded evidence of Hayes's semen on the victim's shirt. Despite the presence of Hayes's semen in the victim's vagina, other circumstantial evidence pointing at another perpetrator raised a reasonable doubt about Hayes. Fla. Comm'n on Capital Cases, *Case Histories: A Review of 24 Individuals Released from Death Row* (rev. 9/10/02) at 38-39 [hereafter Fla.

Comm'n].

Similarly, when the California Supreme Court vacated **Troy Lee Jones's (66)** murder conviction on grounds of ineffective assistance of counsel, the court noted that there was still evidence suggesting Jones's guilt even if that evidence was not overwhelming. *In re Jones*, 13 Cal.4th 552, 588 (1996). However, due to the passage of time, the prosecution no longer had the evidence and witnesses available to retry the case. Susan Herendeen, *Killer's Appeal Could Take Decades with Huge Backlog, Death Penalty Cases Creep Through System,* Modesto Bee, March 17, 2005, at A12.

Warren Douglas Manning (83) was tried five times. The first four trials ended as either mistrials or convictions which were reversed for instructional and venue error. *State v. Manning*, 409 S.E.2d 372 (S.C. 1991); *State v. Manning*, 495 S.E.2d 191 (S.C. 1997). Manning was acquitted after his fifth trial. However, the jury's verdict was not based on "actual innocence." Rather, as his lawyer conceded to the jury: "If there wasn't any case against Warren Manning, then we wouldn't be here. But the law requires that the state prove him guilty beyond a reasonable doubt. Without that, the law says you cannot find him guilty." Associated Press, *Man Found Innocent in Trooper's Death,* September 30, 1999.

A final example suffices to explain why the DPIC List's inclusion of these types of cases is problematic in failing to establish that the judicial system convicted the "wrong person." **Steven Smith's (79)** conviction was ultimately reversed for insufficiency of the evidence with this caveat: "While a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. Courts do not find people guilty or innocent. They find them guilty or not guilty. A not guilty verdict expresses no view as to a defendant's innocence. Rather, it indicates simply that the prosecution has failed to meet its burden of proof. . . . When the State cannot meet its burden of proof, the defendant must go free. This case happens to be a murder case carrying a sentence of death against a

defendant where the State has failed to meet its burden. It is no help to speculate that the defendant may have killed the victim." *People v. Smith*, 708 N.E.2d 365, 371 (Ill. 1999).

2. The DPIC List Includes Defendants Who Were The Actual Perpetrators or Principals

Contrary to the original Stanford Study, the DPIC List includes defendants who were involved in the murders they were charged with committing, even if they were not the actual perpetrators. **Richard Neal Jones (34)** was acquitted of murder, but remained implicated in the conspiracy leading to the murder. *See Jones v. State*, 738 P.2d 525 (Okla.Crim.App. 1987); *Mann v. State*, 749 P.2d 1151 (Okla.Crim.App. 1988); *Thompson v. Oklahoma*, 487 U.S. 815, 817, 859 (1988); *Thompson v. State*, 724 P.2d 780 (Okla.Crim.App. 1986) (separate trial of co-defendant with evidence directly implicating Jones). Similarly, the evidence was insufficient that **Ricardo Aldape Guerra (69)** was the actual triggerman in the murder of a police officer, but the evidence remained that he was an accomplice. *Guerra v. Johnson*, 90 F.3d 1075, 1076 (5th Cir. 1996). Since Guerra was not prosecuted under the "law of parties," he could not be retried. *Plata v. State*, 875 S.W.2d 344, 347 (Tex.Crim.App. 1994).

The DPIC List abandons the criteria of the Stanford Study and includes defendants who were not the "wrong persons," but were acquitted on grounds of justified or excusable homicide: **Michael Linder (18)** (self defense), Cooley, *supra*, at 948; **Robert Wallace (33)** (accidental shooting/self-defense).

3. The DPIC List Includes Defendants Who Benefitted From The Exclusion Of Evidence Of Their Guilt

Defendants who cannot be retried because they have benefitted from the "windfall" of suppressed evidence of their guilt are not "actually innocent." "[I]t has long been clear that exclusion of illegally seized but wholly reliable evidence

renders verdicts less fair and just, because it 'deflects the truthfinding process and often frees the guilty.'" *Kimmelman v. Morrison*, 477 U.S. 365, 391-98 (1986) (Powell, J. concurring); *In re Neely*, 6 Cal.4th 901, 922-25 (1993) (Arabian, J. concurring) (suppression of tape recording of defendant's admissions renders retrial "inherently less reliable"). Yet the DPIC List contains defendants whose cases were dismissed because evidence of their guilt was excluded on retrial.

When he was interrogated, **Jonathan Treadaway (13)** made a number of incriminating statements to police and failed to explain other incriminating evidence. The evidence of his statements was suppressed because of a technical violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). *State v. Corcoran*, 583 P.2d 229 (Ariz. 1978). Of course, the exclusion of a statement on *Miranda* grounds does not mean that the statements were involuntary or unreliable. *Dickerson v. United States*, 530 U.S. 428, 444 (2000). The exclusion of these statements precluded evidence of a "consciousness of guilt" by Treadaway that could have affected the jury's ultimate acquittal of him on retrial. Stanford Reply *supra*, at 164; *In Spite of Innocence*, at 349. The acquittal did not mean that Treadaway was "actually innocent."

The trial court excluded evidence of **Dale Johnston's (43)** guilt that was seized as the "fruit of the poisonous tree" of an unconstitutionally coercive interrogation. *State v. Johnston*, 580 N.E.2d 1162 (Ohio 1990). Subsequently, a state trial court rejected Johnston's request for compensation for wrongful imprisonment because his innocence was not established. *Conviction Reversed, But Money Denied*, Cleveland Plain Dealer, Aug. 11, 1993, at B3.

Benjamin Harris (70) made incriminating statements that he committed a contract killing to the police, which he then contradicted on the witness stand when he denied that the killing was contractual. The incriminating statements were then suppressed on the ground that Harris's attorney was ineffective for permitting Harris to talk to the police. *Harris v. Wood*, 64

F.3d 1432 (9th Cir. 1995). Harris was not retried. Maureen O'Hagan, *Exonerated but Never Set Free Is Benjamin Harris Mentally Ill or Sane,* Seattle Times, Mar. 31, 2003, at B1.

4. The DPIC List Includes Defendants Who Were Acquitted Based On Recantations That Are "Properly Viewed With Great Suspicion"

Recantations "are properly viewed with great suspicion." *Dobbert v. Wainwright*, 468 U.S. 1231, 1233 (1984) (Brennan, J. dissenting.); *see also Allen v. Woodford*, 395 F.3d 979, 994 (9th Cir. 2005) and cases cited therein. Notwithstanding the inherent unreliability of recantations, the DPIC List includes defendants who were acquitted or who had their cases dismissed because of recanted testimony and statements.

For instance, **Joseph Green Brown (27)** could not be retried because of the multiple recantations of the prosecution's witness. Fla. Comm'n at 18.[11/]

Oscar Lee Morris (93) was found ineligible for the death penalty due to insufficient evidence. *People v. Morris*, 46 Cal.3d 1 (Cal. 1988). Ultimately, he was released due to a "deathbed recantation" given by a prosecution witness under "suspicious circumstances." *People v. Oscar Lee Morris* (BH001152) (order of Los Angeles County Superior Court dated 1/21/00). After Morris's unsuccessful civil rights suit, the Los Angeles City Attorney referred to the recantation as "an under-the-cover recitation with nobody who can verify it one way or another." Wendy Russell, *L.B. Wins Suit over Ex-Inmate; Court, Jurors Quickly Decide that Officers didn't Violate Man's Civil Rights,* Long Beach Press-Telegram, Nov. 21, 2002, at A4.

When **Joaquin Martinez (96)** was returned for retrial, his ex-wife recanted the testimony she gave against him at the first

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11. In fact, Justice Brennan cited Brown's case for the proposition that recantations should be viewed with great suspicion. *Dobbert, supra,* citing *Brown v. State*, 381 So.2d 690 (1980).

trial. The taped statements that could have contradicted her recantation were excluded. *Martinez v. State*, 761 So.2d 1074 (Fla. 2000); Fla. Comm'n at 70-71.

5. The DPIC List Ignores Evidence From The Trials Of Co-Defendant's And Other Cases Inconsistent With Claims Of "Actual Innocence"

When co-defendants are tried separately, evidence admissible against a defendant in one trial may not be admissible in the other. In several cases, the evidence elicited in other trials casts doubts on the "actual innocence" of defendants listed on the DPIC List.

For instance, **James Robison's (53)** conviction was reversed due to evidentiary error and he was acquitted on retrial. However, evidence incriminating Robison was introduced at the separate trial of his alleged accomplice. *State v. Dunlap*, 930 P.2d 518, 535 (Ariz.App. 1996).

Muneer Deeb (54) was acquitted of a bungled murder for hire after his case was reversed for hearsay error. A previous witness also refused to testify. *Deeb v. Texas*, 815 S.W.2d 692 (Tex.Crim.App.1991); Barbara Kessler, *Fighting the System Ex-Inmate Acquitted of Waco Murders Embraced by Rights Advocates, But Skeptics Doubt Innocence,* Dallas Morning News, Nov. 4, 1993 at A1. However, evidence at the separate trial of Deeb's alleged co-conspirator still connected Deeb with the murder. *Spence v. Johnson*, 80 F.3d 989, 1004 fn. 12 (5th Cir. 1996).

6. The DPIC List Ignores Media Reports Inconsistent With "Actual Innocence"

"Defendants are acquitted for many reasons, the least likely being innocence. A defendant may be acquitted even though almost every member of the jury is satisfied of his guilt if even one juror harbors a lingering doubt." Schwartz, *supra*, at 154-155. Although the DPIC List cites media reports as sources for its information, it disregards statements by jurors inconsistent

with the conclusion that a defendant is "actually innocent." While such statements are not admissible as evidence, these contemporaneous post-verdict explanations illustrate the distinction between acquittal and "actual innocence."

The jurors who acquitted **Robert Charles Cruz (58)** explained their not guilty verdict as a matter of "reasonable doubt." "Jurors admitted that they had doubts as soon as they voted unanimously for acquittal, with some saying they walked into the courtroom with aching stomachs. Some said they were consoled by the thought that if Cruz was involved, he had spent nearly 15 years in prison." J.W. Brown, *Man Freed in 5th Murder Trial Served 14 Years, Faced Execution for Slayings,* Arizona Republic, June 2, 1995, at B1. Similarly, a juror in the **Alfred Rivera (84)** trial characterized the acquittal as only a matter of reasonable doubt. *Ex-Death Row Inmate Acquitted in Retrial*, Charlotte Observer, Nov. 24, 1999, at C5.

7. The DPIC List Includes Cases In Which The Conventional System Of Appellate Review Worked To The Defendant's Benefit

Cases in which convictions were reversed "in the normal course of appellate review" without the "fortuitous discovery of new evidence" should have no "legitimate role to play in attacks on the death penalty." Marshall, *supra*, at 84 (analyzing "exonerations" in Illinois). The DPIC List includes many cases in which defendants were acquitted on retrial after reversal on direct review or were released on grounds of insufficient evidence due to the idiosyncrasies of state law. These cases do not advance any arguments for the widening of federal court jurisdiction.

Annibal Jaramillo's (21) was released after his conviction was reversed for insufficient evidence because of Florida's peculiar state law which required circumstantial evidence to be inconsistent with any reasonable hypothesis of innocence. This standard is not required by the Constitution or utilized in other states. *Jaramillo v. State*, 417 So.2d 257 (Fla. 1982); *Fox v.*

State, 469 So.2d 800, 803 (Fla.App. 1985). Similarly, **Robert Cox's (38)** conviction was also reversed because of insufficient evidence. "Circumstances that create nothing more than a strong suspicion that the defendant committed the crime was not sufficient to support a conviction . . . Although state witnesses cast doubt on Cox's alibi, the state's evidence could have created only a suspicion, rather than proving beyond a reasonable doubt, that Cox, and only Cox, murdered the victim." *Cox v. State*, 555 So.2d 352 (Fla. 1989).

Delbert Tibbs (11) murdered the boyfriend of the woman he raped. On appeal, Tibbs benefitted from a now obsolete Florida rule that "carefully scrutinized" the testimony of the prosecutrix since she was the sole witness in the rape case "so as to avoid an unmerited conviction." *Tibbs v. State*, 337 So.2d 788, 791 (Fla. 1976). Thus, despite the evidence of Tibbs's guilt as stated in this Court's opinion in *Tibbs v. Florida*, 457 U.S. 31, 33-35 (1982), his conviction was reversed – an action that the Florida Supreme Court later regretted as "clearly improper." *Tibbs v. State*, 397 So.2d 1120, 1126 (Fla. 1981).

Juan Ramos (32) was acquitted after his conviction was reversed because of inadequate foundation for the admission of dog scent evidence. *Ramos v. State*, 496 So.2d 121 (Fla. 1986). **Sabrina Butler (61)** was acquitted after the state court reversed her conviction because the prosecutor improperly commented on her failure to testify at her trial for murdering her infant son. *Butler v. State*, 608 So.2d 314 (Miss. 1992). **Thomas Kimbell (101)** was acquitted after his case was reversed because the trial court did not permit him to impeach a witness with prior inconsistent statements. "[T]he reality is that we don't know for sure why the two Kimbell juries came to two different conclusions." Kurtis, *The Death Penalty on Trial* 195 (2004).

Carl Lawson's (67) case is an "example of the system working well." Marshall, *supra*, at 89. He was acquitted on retrial after his case was reversed because the trial court denied him funds for a shoeprint expert and because his attorney had a conflict of interest. *People v. Lawson*, 644 N.E.2d 1172 (Ill.

1994). **"Steven Manning [(85)]** is another case in which it appears that the system itself worked." Marshall, *supra*, at 88. Manning's case was reversed for evidentiary error and he was acquitted on retrial.

Wesley Quick's (109) multiple murder convictions were reversed because the trial court impeded the cross-examination of prosecution witnesses. . . . Quick had testified he had been on LSD and did not remember what happened during the murders. *Quick v. State*, 825 S.2d 246 (Ala.App. 2001). When Quick was retried, he changed his version of events and impeached the witnesses. His subsequent acquittal is another example of the state appellate system properly working. However, Quick's changing testimony does not support a conclusion that he was the prototypical "wrong person." Associated Press, *Once Convicted of Murder, Man Acquitted in New Trial*, Apr. 22, 2003.

8. The DPIC List Is Artificially Expanded To Include Irrelevant Cases Of Defendants Who Were Convicted Under Unconstitutional Death Penalty Statutes

The era of 1973-1976 was a watershed in death penalty jurisprudence. Death judgments that were imposed prior to that time or under statutes which limited consideration of mitigating evidence were unconstitutional. The defendants were convicted and sentenced to death without the benefit of recent innovations in capital proceedings. These innovations were described by the authors of *In Spite of Innocence* as follows: "Current capital punishment law already embodies several features that probably reduce the likelihood of executing the innocent. These include abolition of mandatory death penalties, bifurcation of the capital trial into two distinct phases (the first concerned solely with the guilt of the offender, and the second devoted to the issue of sentence), and the requirement of automatic appellate review of a capital conviction and sentence." *Id.* at 279.

Given this dramatic change in capital case jurisprudence,

the DPIC List's inclusion of cases involving defendants convicted under these obsolete, unconstitutional statutes is not helpful in assessing the adequacy of the present-day collateral review system. Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 Stan. L. Rev. 121, 147-152 (1988). Yet, the DPIC List still includes the following irrelevant cases: **David Keaton (1)** (pre-*Furman* Florida statute), **Samuel A. Poole (2)** (North Carolina mandatory statute),[12/] **Wilbur Lee (3)**, **Freddie Pitts (4)** (pre-*Furman* Florida statute), **James Creamer (5)** (pre-*Furman* Georgia statute), **Christopher Spicer (6)** (North Carolina mandatory statute), **Thomas Gladish (7)**, **Richard Greer (8)**, **Ronald Keine (9)**, **Clarence Smith (10)** (mandatory New Mexico statute), **Gary Beeman (14)** (Ohio's pre-*Lockett v. Ohio*, 438 U.S. 586 (1978) statute), **Johnny Ross (19)** (mandatory Louisiana statute), **Ernest (Shujaa) Graham (20)** (mandatory California statute), **Lawyer Johnson (22)** (pre-*Furman* Massachusetts statute), **James Richardson (40)** (pre-*Furman* Florida statute), **Peter Limone (94)** (pre-*Furman* Massachusetts standard), **Timothy Howard (111)**, **Gary Lamar Jones (112)** (pre-*Lockett* Ohio statute), and **Laurence Adams (117)** (pre-*Furman* Massachusetts statute).

The consequence of including these anachronisms is to artificially inflate the number of "actual innocent" defendants on the DPIC List in order to seek changes in current death penalty law. Since it is totally speculative whether these defendants would have been convicted and sentenced to death under today's rules, they are irrelevant to assessing the advisability of litigating freestanding claims of actual innocence in federal court or changing the rules of procedural default.

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12. Moreover, the evidence of Poole's actual innocence is "weak." Cooley, *supra*, at 917.

D. The DPIC List Does Not Support A Cognizable Freestanding Claim Of Actual Innocence Or Modification Of The Exceptions To The Procedural Default Rule

In the final analysis, the claims that the 122 Death Row defendants on the DPIC List have all been exonerated are based on overly inclusive criteria and irrelevant cases. These cases do not justify federal court intrusion into state criminal justice systems.

To compile its List, the DPIC relies on inexact standards, such as acquittals on retrial, dismissals by the prosecution, and reversals for legal insufficiency of evidence, to exonerate released death row inmates. However, there is a big difference between "reasonable doubt" and the kind of "wrong person mistake" that was the genesis of the original Stanford study. Moreover, the DPIC uses old cases in which the defendants did not receive the modern protections that "probably reduce the likelihood of executing the innocent." It ignores the fact that the criminal justice system includes a system of review which gives defendants repeated opportunities to test the fairness of their convictions.

On its own terms, the DPIC List claims "actual innocence" for only 1.6 per cent of the 7,529 death sentences imposed between 1973 and 2004. Bureau of Justice Statistics Bulletin, *Capital Punishment 2004*, App. Table 2.[13] The more conservative approach of the court in *Quinones I* only recognized "actual innocence" in one-half of one per cent of the 7,084 death sentences imposed between 1973 and 2001. Finally, based on the DPIC List descriptions, approximately 100 of the 122 cases on the DPIC List were acquittals, dismissals, or exonerations that occurred due to state judicial and executive

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13. The inclusion of the twenty irrelevant cases that predate current death penalty statutes impacts this calculation. Without those cases, the "actual innocence" cases on the DPIC List drops to only 1.4 per cent of the 7,529 death sentences since 1973.

actions, not federal court proceedings. And, it is worth emphasizing, no "actually innocent" person has been identified as having been executed.

In the end, this Court is left with the same situation it confronted in *Herrera*, neither this Court nor amici question the potential fallibility of our criminal justice system, even with its unique and unparalleled federal and state procedural protections. However, the evidence is no more compelling now than it was during *Herrera* to expand federal court habeas power to entertain freestanding claims of "actual innocence" when no Constitutional error has occurred or to lighten the burden on habeas applicants to overcome their procedural failures in state court.

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In the Supreme Court of the United States

PAUL GREGORY HOUSE,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR FORMER PROSECUTORS AND PROFESSORS OF CRIMINAL JUSTICE AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[*]

Amici curiae are former prosecutors and professors of criminal justice who have a continuing interest in maintaining the legitimacy of the criminal justice system as a fair and effective means of punishing the guilty and freeing the innocent.[1] Fair administration of the death penalty is a critical test of any system of justice. Under the intense public scrutiny capital cases receive, the failure to produce a just result resounds far beyond the confines of a particular case. The role of prosecutors is weakened, and their credibility before juries, judges, and the public is diminished, if a just outcome is not evident where the public most demands it.

This is one such case. Petitioner has a powerful claim of actual innocence, supported by unusually convincing evidence, but has been unable to escape the sentence of death. Adoption of the Sixth Circuit's approach would have the inevitable result of undermining public confidence in our system of justice, by increasing the possibility of wrongful executions and wrongful incarceration. *Amici* accordingly submit this brief from the perspective of individuals with a strong interest in ensuring the reliability of the criminal justice system and who share a concern that the task of prosecutors will become more difficult if the public cannot be confident that the innocent can be exonerated. The *en banc* majority in this case, having applied an unduly restrictive approach to this Court's reasoned precedents regarding habeas

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[*] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court, pursuant to Sup. Ct. R. 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* or their counsel, made a monetary contribution to the preparation or submission of this brief.

[1] A list of *amici* is found in Appendix A.

corpus claims of actual innocence, threatens those important interests. The judgment should therefore be reversed.

ARGUMENT

I. Public Confidence In The Integrity Of The Death Penalty Depends Upon The Ability To Halt The Execution Of Inmates Who Present Persuasive Evidence of Actual Innocence

In recent years, DNA and other evidence has shown that a significant number of inmates sentenced to death were actually innocent. Those exonerations quite naturally have garnered significant publicity.[2] Prosecutors' credibility before juries and the public depends upon the existence of a full range of safety valves to free the innocent when errors have occurred. Accessible judicial remedies for colorable claims of actual innocence serve this vital purpose.

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[2] See, *e.g.*, Larry Fish, *Cleared Death-Row Inmate to Be Freed*, Phila. Inquirer, Jan. 14, 2004, at B1 (Nicholas James Yarri cleared after spending more than half his life on Pennsylvania's death row); John W. Gonzalez, *Death Row Inmate Cleared In '86 Fire*, Houston Chronicle, Oct. 6, 2004, at B1 (Ernest Ray Willis cleared after spending 17 years on Texas death row); J.M. Lawrence, *Free At Last; 30-Year Journey from Death Row to Home*, Boston Herald, May 21, 2004, at 3 (Laurence Adams freed after 1974 Massachusetts death sentence); Henry Weinstein, *DNA Tests Finally Clear Louisiana Man Of Murder*, L.A. Times, Aug. 10, 2004, at A12 (Ryan Matthews freed after spending more than five years on Louisiana death row); Joseph Neff, *Gell Found Not Guilty*, News & Observer, Feb. 19, 2004, at A1 (Alan Gell freed after 1998 North Carolina death sentence); Kimball Perry, *'85 Murder Conviction Dismissed*, Cincinnati Post, Mar. 1, 2005, at A8 (Derrick Jamison wins dismissal of charges for which he spent 17 years on Ohio's death row); cf. Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. Times, Feb. 1, 2000, at A1.

A. The Integrity Of The Criminal Justice System Is Judged By Its Fairness To The Innocent

"[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup* v. *Delo*, 513 U.S. 298, 325 (1995). That is because "the central purpose of any system of criminal justice" is not just "to convict the guilty," but to "free the innocent." *Herrera* v. *Collins*, 506 U.S. 390, 398 (1993). Accordingly, the government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935).

Within this scheme, prosecutors are entrusted with a "special role * * * in the search for truth in criminal trials." *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999). The prosecutor's role "transcends that of an adversary: [the prosecutor] 'is the representative not of an ordinary party to a controversy, but of a sovereignty.'" *United States* v. *Bagley*, 473 U.S. 667, 675 n.6 (1985) (quoting *Berger* v. *United States*, 295 U.S. 78, 88 (1935). See also National District Attorneys Association, *National Prosecution Standards* 9 (2d ed. 1991) ("The primary responsibility of prosecution is to see that justice is accomplished."); American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function* § 3-1.2(c) (3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict."); *id.* § 3-1.2 cmt. ("it is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty").

Where, however, prosecutors fail for whatever reason to acquiesce in the face of a strong showing of 'actual innocence,' the courts can and must step in. As this Court has found, "a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional" and warrant habeas relief. *Herrera*, 506 U.S. at 417. Concern for execution of the innocent, com-

pounded by additional constitutional concern for the conduct of the trial, requires that the burden of proof for "gateway" claims be a reasonable one. There, "a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks [it] should have" in the verdict. *Schlup*, 513 U.S. at 325 (internal citation omitted), and reflects "the relative importance attached to the ultimate decision." *Ibid.* Accordingly, the legal framework governing claims of actual innocence must recognize "[t]he paramount importance of avoiding the injustice of executing one who is actually innocent." *Ibid.*

B. Imposition Of The Death Penalty Merits A Higher Standard Of Reliability Than Other Punishments

The American people and their Constitution hold the death penalty to a higher standard of reliability than other punishment. As the Court has recognized,

> the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.) (footnote omitted); see also *Solem* v. *Helm*, 463 U.S. 277, 294 (1983) ("the death penalty is different from other punishments in kind rather than degree").

In light of the public's justified scrutiny of the application of the death penalty, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather

than caprice or emotion." *Gardner* v. *Florida*, 430 U.S. 349, 357-358 (1977).

C. Public Confidence In The Reliability Of The Justice System Has Been Shaken In The Decade Since *Herrera* and *Schlup*, In The Wake Of Revelations That Innocent Defendants Have Been Condemned To Death

Recent DNA evidence and other evidence raise the specter of "[t]he quintessential miscarriage of justice" in "the execution of a person who is entirely innocent." *Schlup*, 513 U.S. at 324-326 & n. 42. When *Herrera* and *Schlup* were decided, there was not widespread concern over the possibility of executing the innocent. The public and the courts maintained confidence in the application of the death penalty "in no small part because the Constitution offers unparalleled protections against convicting the innocent." *Herrera*, 506 U.S. at 420 (O'Connor, J., concurring).

Many believed that the advent of DNA testing would merely confirm the accuracy with which our system of justice catches and punishes the guilty. See William S. Sessions, *DNA Tests Can Free the Innocent. How Can We Ignore That?*, Wash. Post, Sept. 21, 2003, at B2 (former head of FBI describing the creation of the FBI's DNA testing lab, and calling on fellow prosecutors and legislators to assure meaningful access to DNA evidence that can prove innocence). The results proved otherwise. They demonstrated that DNA gathered at a crime often did not match the individuals identified for prosecution. See, *e.g.*, *id.* (finding approximately 25% of DNA tests excluded the prime suspect in the investigation as the perpetrator). As DNA testing spread, so did exonerations. See *id.* (noting 137 post-conviction DNA exonerations for all crimes as of 2003).[3] The number

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[3] See also Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523

of individuals who were at one time sentenced to death but later exonerated of the crimes charged has climbed to 121 since 1973. Death Penalty Information Center, *Innocence and Death*, *available at* http://www.deathpenaltyinfo.org/article. php?did= 412& scid= 6#inn-yr-rc.[4] And the total number of post-conviction DNA exonerations (both capital and non-capital) in the United States has now reached 162. See http://www.innocenceproject.org/case/index.php (summarizing and indexing each post-conviction DNA exoneration).

In one celebrated case, journalism students helped to discover evidence that eventually helped to free four men in Illinois, two of whom had been sentenced to death. John Carpenter, *Hard Work Helps Bring Justice to 4 Innocent Men*, Chi. Sun-Times, June 23, 1996, at 26. Through the seemingly obvious technique of interviewing available witnesses, the students spurred an investigation that led to DNA tests and eventual exoneration of the four men. *Id.* Remarkably, students from the same class played a pivotal role a few years later in the release of a man who had spent sixteen years on death row. John Jeter, *Students' Probe Ends 16*

(2005) (locating 340 individual exonerations from 1989 through 2003, almost all of which "are clustered in two crimes: rape and murder").

[4] Research on death penalty verdicts has further eroded confidence in their reliability. See, *e.g.*, James Liebman, Jeffrey Fagan & Valerie West, *A Broken System; Error Rates In Capital Cases*, 1973-1995 (2000) (finding 65% overall error rate in capital punishment system, and 82% of all capital judgments reversed on appeal were replaced on retrial with a sentence less than death or no sentence at all, and, among reversals, 7% resulted in acquittals); see also James Liebman, *Overproduction Of Death*, 100 Colum. L. Rev. 2030 (2000) (arguing that strong incentives exist at trial to impose the death penalty on those who do not deserve it under applicable state substantive law).

Years on Death for Illinois Man, Wash. Post, Feb. 6, 1999, at A3. The credibility of the criminal justice system takes a well-deserved hit when such cases are publicized.

As exonerations have mounted, the number of death sentences has decreased dramatically across America. In the 1990s, death sentences numbered over 300 per year. See, *e.g.*, U.S. Dep't of Justice, Bureau of Justice Statistics, *Capital Punishment, 1996* (1997) (320 sentences of death in 1996). In 2003, by contrast, 144 inmates received death sentences, the lowest in 25 years. U.S. Dep't of Justice, Bureau of Justice Statistics, *Capital Punishment, 2003* 8, 14 (2004). As one observer noted, "'[j]uries are more reluctant to impose the death sentence for a variety of reasons, prime among them a parade of wrongfully convicted people leaving death row.'" Henry Weinstein, *Death Sentences on Decline as Public's Skepticism Grows*, L.A. Times, Dec. 14, 2004, at A 28 (quoting Robin M. Maher, director of ABA death penalty representation project).[5]

At the same time, the public has registered increasing concern over the administration of the death penalty. Of those surveyed in a recent poll, 62% were "very concerned" that innocent people may be put to death. An additional 26%

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[5] In Tennessee, other problems touching upon the legitimacy of death sentences have been reported. See, *e.g.*, John Shiffman, *Troubled Lawyers Still Allowed to Work Death Cases*, Tennessean, July 25, 2001, at 1A ("In the past quarter century, at least 39 Tennessee lawyers who have been disciplined by the state have represented defendants in capital cases * * * include[ing] lawyers who seriously neglected client's cases — missed key filing deadlines, failed to interview important witnesses, or lied to or stole from clients."); John Shiffman, *1 in 4 Blacks Condemned by All-White Juries*, Tennessean, July 27, 2001, at 1A ("All-white juries have sent 15 black men to Tennessee's death row since 1977 * * * [; t]hat accounts for one of every four blacks sentenced to death statewide — and one in two blacks outside Shelby County.").

were "somewhat concerned." Together, a combined total of 88% of respondents were concerned that innocent people may be put to death. Harris Interactive Poll, Feb. 12, 2003.

Support for the death penalty is diminished among respondents who believed that innocent people have been executed. James D. Unnever & Francis T. Cullen, *Executing the Innocent and Support for Capital Punishment: Implications for Public Policy*, 4 Criminology & Pub. Pol'y 3, 15 (2005) (finding a difference in support for the death penalty between the groups of nearly 20%). Even among supporters of capital punishment, grave concerns exist over its application. A study of public opinion in Texas, where a large majority supports capital punishment, found that a majority of respondents also supported a moratorium on executions. Scottt Vollum et al., *Confidence in the Death Penalty and Support for Its Use: Exploring the Value-Expressive Dimension of Death Penalty Attitudes*, 21 Just. Q. 521, 533 (2004) (registering 82 percent support for capital punishment and 64 percent support for a moratorium on executions). The surprising match of support for capital punishment with the desire for a moratorium on executions was most closely correlated with concern about the "protect[ion of] innocent people from being executed." *Id.* at 531, 536.

Concern over the number of exonerations has also found voice in this Court. See *Atkins* v. *Virginia*, 536 U.S. 304, 320 n.25 (2002) (noting the "disturbing" number of inmates on death row who have been exonerated); see also Assoc. Press, *O'Connor Questions Death Penalty*, N.Y. Times, July 4, 2001, at A9 (quoting Justice O'Connor's statement that "[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed").

Amici urge this Court to vindicate our shared interest in ensuring that the public's confidence in the accuracy and fairness of our justice system is restored. That goal is frustrated if the courts are perceived to be placing undue hurdles

in front of defendants who discover strong evidence of innocence (particularly, but not limited to, DNA evidence) after conviction. If we are to ask citizens, as jurors, to deprive a person of liberty or to impose the ultimate sanction of death — or, through their elected representatives, to provide us with the necessary resources to investigate and prosecute crime — then our system of justice must, no less aggressively, seek to exonerate the wrongfully convicted.

II. Any Burden Imposed By Adjudication Of Claims Of Actual Innocence Is Far Outweighed By The Benefit Of Maintaining The Credibility Of Our System Of Justice

The cost to the credibility of our system of justice from the potential execution of the innocent far outweighs any disruption in proceedings that adjudication of actual innocence claims may bring. Although finality is important, *Calderon* v. *Thompson*, 523 U.S. 538, 555-556 (1998) (finality essential to retributive and deterrent functions of criminal law), its value is premised upon the assumption that those who are prosecuted and punished are in fact responsible for their crimes.

The number of credible actual innocence claims will always remain quite small. See *Schlup*, 513 U.S. at 325 n. 42 (observing that in a majority of federal habeas cases, claims would be rebutted by a strong presumption of guilt); see also Edward Lazarus, *The Limits of DNA Justice*, Wash. Post, June 16, 2000, at A-29 ("the universe of cases where DNA testing can provide such magic-bullet results is very small: basically, only rape or rape-murder cases, in which the exchange of genetic material necessarily occurs"). Even among all federal habeas claims, only a very small percentage are granted or remanded. See U.S. Dep't of Justice Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 17 (1995) (finding only

1% of petitions granted and another 1% remanded to state courts).

Indeed, a review of the adjudication of *Schlup* claims in the lower federal courts in the decade since this "gateway" became available provides additional indications that it is serving its intended purpose as a final safeguard against wrongful execution and imprisonment, without unduly burdening the courts with frivolous claims. *Amici* conducted a review of all judicial opinions available on Westlaw and Lexis (whether published or unpublished) since 1995 in which petitioners sought to avail themselves of the *Schlup* "gateway" by presenting what they claimed was new evidence of actual innocence. This research revealed that such decisions were issued by only 338 federal habeas courts (143 circuit courts, and 195 district courts). In 31 of those cases — 9.2% of the total — the courts found that the petitioners had presented sufficiently powerful claims of actual innocence to warrant consideration of their otherwise procedurally-barred constitutional claims. See Appendix B (listing all such cases). And in the vast majority of those cases, the underlying claims (whether of actual innocence, or of independent constitutional violations) were sufficiently meritorious as to result in immediate or eventual relief from the petitioner's conviction or sentence.

This "big picture" data certainly appears to suggest that the *Schlup* gateway, and the governing standard of relief, are functioning appropriately. *Schlup* has proven itself to be the extraordinary remedy and necessary safeguard that is applied only to petitioners in the small fraction of cases involving truly compelling evidence of actual innocence. Nor are the meritorious cases so entirely rare as to suggest that *Schlup* has not made and will not continue to make a meaningful contribution to our justice system. Indeed, to the 20 individual petitioners who have obtained such relief, it may well have made the difference between execution or a lifetime in prison and one at liberty. Surely, any "raising of

the bar" under *Schlup* that would deprive many such individuals of relief should be undertaken only on a compelling showing of need — a need that does not appear to exist given the lower courts' reasonable application of the current rule over the last decade.

Moreover, for the few credible claims of actual innocence that arise in federal habeas review, the values of efficiency and finality must be weighed against a basic principle of fairness that permits execution only if the defendant actually committed the crime of which he or she is accused. In that regard, "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Kaufman* v. *United States*, 394 U.S. 217, 228 (1969). And of course the State wins, too, when exonerations permit it to prosecute and punish the true perpetrators of crime.[6] That is the essence of justice.

CONCLUSION

For the reasons set forth above and in petitioner's brief, the judgment of the Sixth Circuit should be reversed.

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6 See Tom Ragan, *Years After Death Row Travesty, Killer Gets Due*, Chi. Trib., Sept. 8, 1999, at 1 (subsequent conviction of a different defendant for double murder that had wrongfully put Anthony Porter on Illinois' death row for fourteen years).

Respectfully submitted.

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APPENDIX A

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Daniel A. Bent	United States Attorney, D. Haw. 1982-1993; former Chief, Criminal Division and First Assistant United States Attorney, E.D. La.
James S. Brady	United States Attorney, W.D. Mich. 1971-1981
Robert C. Bundy	United States Attorney, D. Alaska 1994-2001
Kenneth Bynum	Assistant United States Attorney, D.D.C. 1984-1988
Paul B. Carroll	Consultant and trainer on police practices at National Institute of Justice, U.S. Dep't of Justice; 30 year veteran, Chicago Police Department
Barry Coburn	Assistant United States Attorney, D.D.C. 1985-1990

Gary Cordner, Ph.D.	Professor of Criminal Justice & Police Studies; Director, Regional Community Policing Institute; Director, International Justice & Safety Institute, Eastern Kentucky University; former Dean of the College of Justice & Safety, Eastern Kentucky University; Chief of Police, St. Michaels, Md. 1984-1987; former president, Academy of Criminal Justice Sciences; former-editor, American Journal of Police; former editor, Police Quarterly
Katherine B. Darmer	Associate Professor, Chapman University School of Law; Assistant United States Attorney, S.D.N.Y. 1995-1999
W. Thomas Dillard	United States Attorney, E.D. Tenn. 1981; N.D. Fla. 1983-1986
Steven Gilbert, Ph.D.	Director of Criminal Investigations Program, Assistant Professor, State University of New York, Canton
Hal D. Hardin	United States Attorney, M.D. Tenn. 1977-1981
Valerie Hunt, Ph.D	Visiting Professor, University of Arkansas, Dep't of Sociology and Criminal Justice
Eric J. Miller	Assistant Professor, St. Louis University Law School

Lawrence Kobilinsky, Ph.D	Professor, Associate Provost, John Jay College of Criminal Justice
Thomas R. O'Conner, Ph.D	Professor, North Carolina Wesleyan College
Katrina Pflaumer	United States Attorney, W.D. Wash. 1993-2001
John Raley	United States Attorney, E.D. Okla. 1990-1997
James H. Reynolds	United States Attorney, N. Iowa, 1976-1982
James G. Richmond	United States Attorney, N.D. Ind. 1985-1991
William W. Robertson	Captain, United States Army Judge Advocate General Corps 1968-1972; Assistant United States Attorney, D.N.J. 1972-1976; Chief of the U.S. Dep't Justice Organized Crime Strike Force, D.N.J. 1976-1978; First Assistant United States Attorney, D.N.J. 1978-1980; United States Attorney, D.N.J. 1980-1981

Richard A. Rossman	United States Attorney, E.D. Mich.1980-1981; Chief of Staff Criminal Division, U.S. Dep't of Justice 1998-1999; Chief Assistant United States Attorney, E.D. Mich. 1977-1979; Chief Deputy Federal Defender, Detroit, Mich. 1972-1975; Assistant Prosecuting Attorney, Oakland County, Mich. 1965-1967, 1970-71; Instructor, Detroit Police Department 1975-76
Eli B. Silverman, Ph.D	Professor, John Jay College of Criminal Justice
William D. Wilmoth	United States Attorney, N.D.W.V. 1993-1999

APPENDIX B

This Appendix lists all 338 cases available electronically on Westlaw or Lexis, whether published or unpublished, in which a federal habeas petitioner sought to use *Schlup* v. *Delo* to overcome a procedural default, by asserting a claim of actual innocence and presenting evidence that he or she characterized as "new." In determining which cases fit this criteria, we did not prejudge the merits of the proffered evidence or scrutinize whether it was in fact "newly discovered." If a court analyzed evidence that the petitioner characterized as new for *Schlup* purposes, the case is included on the list below, even if the Court held that the evidence at issue was available at the time of trial or could have been previously discovered with due diligence. On the other hand, if a petitioner did not identify any new evidence of any sort, but only made a bare claim of actual innocence (*i.e.*, based on the trial record), the case was excluded from this review. In some cases, *pro se* petitioners did not explicitly make a *Schlup* claim, but the courts nonetheless analyzed the petition under *Schlup*, and these cases are included below as well.

Because we sought to assess how courts have adjudicated *Schlup* claims under the current "no reasonable juror" standard, the following types of cases were necessarily excluded from our inquiry: 1) habeas claims in which a court stated in dicta that a petitioner had not asserted a claim under *Schlup* or presented any new evidence of innocence, after concluding that some or all of the petitioner's claims were procedurally barred; 2) direct federal appeals in which a defendant made a motion to a trial court to vacate a verdict or for a new trial; 3) "legal innocence" claims in which a petitioner claimed that he was actually innocent based solely on a change in the law; and 4) cases citing *Schlup* solely for unrelated propositions.

Evidence Held Sufficient to Pass Through *Schlup* "Gateway"

Courts of Appeals

Souter v. *Jones*, 395 F.3d 577 (6th Cir. 2005)

Cooper v. *Woodford*, 358 F.3d 1117 (9th Cir. 2004)

Jaramillo v. *Stewart*, 340 F.3d 877 (9th Cir. 2003)

Finley v. *Johnson*, 243 F.3d 215 (5th Cir. 2001)

Silva v. *Wood*, 2001 WL 737591, 14 Fed. Appx. 803 (9th Cir. Jun 29, 2001)

Martin v. *Baldwin*, 234 F.3d 1277 (9th Cir. 2000)

Wilkerson v. *Cain*, 233 F.3d 886 (5th Cir. 2000)

Gall v. *Parker*, 231 F.3d 265 (6th Cir. 2000)

Fairman v. *Anderson*, 188 F.3d 635 (5th Cir. 1999)

Lucas v. *Johnson*, 132 F.3d 169 (5th Cir. 1998)

Carriger v. *Stewart*, 132 F.3d 463 (9th Cir. 1997)

Demarest v. *Price*, 130 F.3d 922 (10th Cir. 1997)

Amrine v. *Bowersox*, 128 F.3d 1222 (8th Cir. 1997)

District Courts

Eastridge v. *United States*, 372 F. Supp. 2d 26 (D.D.C. 2005)

Garcia v. *Portuondo*, 334 F. Supp. 2d 446 (S.D.N.Y. 2004)

Bivens v. *Briley*, No. 00 C7327, 2004 WL 1718437 (N.D. Ill. July 29, 2004)

U.S. ex rel. McLaughlin v. *Bowen*, No. 02 C 8715, 2003 WL 23162441 (N.D. Ill. Sept. 15, 2003)

Nickerson v. *Roe*, 260 F. Supp. 2d 875 (N.D.Cal. 2003)

Brown v. *Crosby*, 249 F. Supp. 2d 1285 (S.D. Fla. 2003)

Brown v. *Singletary*, 229 F. Supp. 2d 1345 (S.D.Fla. 2002)

Paradis v. *Arave*, No.. CIV. 95-0446-S-EJL, 2000 WL 307458 (D. Idaho Mar 14, 2000)

Terry v. *Cross*, 112 F. Supp. 2d 543 (E.D. Va. 2000)

Watkins v. *Miller*, 92 F. Supp. 2d 824 (S.D. Ind. 2000)

Bragg v. *Norris*, 128 F. Supp. 2d 587 (E.D. Ark. 2000)

Reasonover v. *Washington*, 60 F. Supp. 2d 937 (E.D. Mo. 1999)

Jose v. *Johnson*, No. 97-500, 1999 WL 1120374 (D. Or. Dec. 07, 1999)

Johnson v. *Norris*, 999 F. Supp. 1256 (E.D. Ark. 1998)

Abdur'Rahman v. *Bell*, 999 F. Supp. 1073 (M.D. Tenn. 1998)

Lambert v. *Blackwell*, 962 F. Supp. 1521 (E.D. Pa. 1997)

Richter v. *Bartee*, 973 F. Supp. 1118 (D. Neb. 1997)

McCoy v. *Norris*, 958 F. Supp. 420 (E.D. Ark. 1996)

Satcher v. *Netherland*, 944 F. Supp. 1222 (E.D. Va. 1996)

Evidence Held Insufficient to Pass Through *Schlup* "Gateway"

Courts of Appeals

Fruichantie v. *Mazur-Hart*, 139 Fed. Appx. 809 (9th Cir. 2005)

Hundley v. *Roe*, 135 Fed. Appx. 55 (9th Cir. 2005)

Quintero v. *Stewart*, 121 Fed. Appx. 203 (9th Cir. 2005)

Bosley v. *Cain*, 409 F.3d 657 (5th Cir. 2005)

Matthews v. *Mazzuca*, 120 Fed. App. 856(2d Cir. 2005)

Knecht v. *Shannon*, 132 Fed. Appx. 407 (3rd Cir. 2005)

Hayes v. *Battaglia*, 403 F.3d 935 (7th Cir. 2005)

Osborne v. *Purkett*, 411 F.3d 911 (8th Cir. 2005)

Cox v. *Burger*, 398 F.3d 1025 (8th Cir. 2005)

Armstrong v. *Kemna*, 365 F.3d 622 (8th Cir. 2005)

Malone v. *Oklahoma*, 100 Fed. Appx. 795 (10th Cir. 2004)

United States v. *Cervini*, 379 F.3d 987 (10th Cir. 2004)

Watts v. *Norris*, 356 F.3d 937 (8th Cir. 2004)

Nance v. *Norris*, 392 F.3d 284 (8th Cir. 2004)

Sibley v. *Culliver*, 377 F.3d 1196 (11th Cir. 2004)

Doe v. *Menefee*, 391 F.3d 147 (2d Cir. 2004)

Hubbard v. *Pinchak*, 378 F.3d 333 (3rd Cir.2004)

Hargrave-Thomas v. *Yukins*, 374 F.3d 383 (6th Cir. 2004)

Bird v. *Hurst*, 110 Fed. Appx. 474 (6th Cir. 2004)

Townsend v. *Lafler*, 99 Fed. Appx. 606 (6th Cir. 2004)

Allen v. *Yukins*, 366 F.3d 396 (6th Cir. 2004)

Williams v. *Bagley*, 380 F.3d 932 (6th Cir. 2004)

Rouser v. *Pliler*, 105 Fed. Appx. 167 (9th Cir. 2004)

Liang v. *Guirbino*, 99 Fed. Appx. 769 (9th Cir. 2004)

Britton v. *Lehman*, 88 Fed. Appx. 202 (9th Cir. 2004)

Griffin v. *Johnson*, 350 F.3d 956 (9th Cir. 2003)

Gulertekin v. *Tinnelman-Cooper*, 340 F.3d 415 (6th Cir. 2003)

Gomez v. *Jaimet*, 350 F.3d 673 (7th Cir. 2003)

Hussman v. *Vaughn*, 67 Fed. Appx. 151 (3rd Cir. 2003)

Mattis v. *Vaughn*, 80 Fed. Appx. 154 (3rd Cir. 2003)

Sweger v. *Chesney*, 294 F.3d 506 (3rd Cir. 2003)

Blamblett v. *True*, 59 Fed. Appx. 1 (4th Cir. 2003)

Reid v. *True*, 349 F.3d 788 (4th Cir. 2003)

Brown v. *Kaiser*, 82 Fed. Appx. 609 (10th Cir. 2003)

Reynolds v. *Hines*, 55 Fed. Appx. 512 (10th Cir. 2003)

Meeker v. *Ward*, 45 Fed. Appx. 871 (10th Cir. 2002)

Hamm v. *Saffle*, 300 F.3d 1213 (10th Cir. 2002)

Gonzales v. *Jordan*, 37 Fed. Appx. 432 (10th Cir. 2002)

Fleenor v. *Scott*, 37 Fed. Appx. 415 (10th Cir. 2002)

Renfro v. *Scott*, 37 Fed. Appx. 413 (10th Cir. 2002)

Bondy v. *Scott*, 43 Fed. Appx. 168 (10th Cir. 2002)

Patterson v. *Bartlett*, 56 Fed. Appx. 762 (9th Cir. 2002)

McGriff v. *Hall*, 53 Fed. Appx. 405 (9th Cir. 2002)

Holiday v. *Mueller*, 51 Fed. Appx. 636 (9th Cir. 2002)

Charles v. *Baldwin*, 49 Fed. Appx. 715 (9th Cir.2002)

Smith v. *Newland*, 48 Fed. Appx. 233 (9th Cir. 2002)

Idleman v. *Newland*, 46 Fed. Appx. 522 (9th Cir.2002)

Gandarela v. *Johnson*, 286 F.3d 1080 (9th Cir. 2002) (en banc)

Banks v. *Cockrell*, 48 Fed. Appx. 104 (5th Cir. 2002)

Dunham v. *Travis*, 313 F.3d 724 (2d Cir. 2002)

Fortenberry v. *Haley*, 297 F.3d 1213 (11th Cir. 2002)

Sistrunk v. *Armenakis*, 292 F.3d 669 (9th Cir. 2002) (en banc)

Solano v. *Taylor*, 18 Fed. Appx. 660 (9th Cir. 2001)

Van Buskirk v. *Baldwin*, 265 F.3d 1080 (9th Cir 2001)

Bell v. *Pierson*, 267 F.3d 544 (7th Cir. 2001)

Amrine v. *Bowersox*, 238 F.3d 1023 (8th Cir. 2001)

Davis v. *Gammon*, 27 Fed. Appx. 715 (8th Cir. 2001)

Harvey v. *Myers*, 27 Fed. Appx. 850 (9th Cir. 2001)

Loving v. *Mahaffey*, 27 Fed. Appx. 925 (10th Cir. 2001)

Hawkins v. *Hargett*, 28 Fed. Appx. 837 (10th Cir. 2001)

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(13)

No. 04-8990

IN THE
Supreme Court of the United States

PAUL GREGORY HOUSE,
Petitioner,

v.

RICKY BELL, Warden,
Respondent,

On Writ Of Certiorari To
The United States Court of Appeals
For The Sixth Circuit

BRIEF FOR THE INNOCENCE PROJECT, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

The Innocence Project, Inc. ("the Project"), is a nonprofit legal clinic and criminal justice resource center. Founded at the Benjamin N. Cardozo School of Law in 1992, the Project provides *pro bono* legal services to indigent prisoners for whom post-conviction DNA testing can provide conclusive proof of innocence. The Project pioneered the post-conviction DNA litigation model that has to date exonerated over 160 innocent persons, and served as counsel or provided critical assistance in the majority of these cases. Currently, the Project represents over 140 individuals seeking post-conviction DNA testing, or relief from their convictions based on DNA test results, in dozens of states. The Project has also served as counsel in the leading cases heard in the federal courts to date concerning the federal constitutional right of access to exculpatory DNA evidence. These include, *inter alia*, *Harvey v. Horan*, 285 F.3d 298 (4th Cir. 2002), and *Godschalk v. Montgomery County Dist. Atty.'s Ofc.*, 177 F.Supp.2d 366 (E.D. Pa. 2001).

As perhaps the nation's leading authority on DNA evidence and wrongful convictions, the Project and its founders, Barry Scheck and Peter Neufeld (both of whom are members of New York State's Commission on Forensic Science, charged with regulating all state and local crime laboratories) are regularly consulted by officials at the state, local, and federal level. This work has given *amicus* a particularly strong interest in ensuring that jury verdicts are premised upon valid and accurate forensic science – an interest that is directly implicated by this Petitioner's constitutional claims in a number of respects.

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[*] *Amicus* certifies that this brief was written by undersigned counsel, and that no counsel for a party authored any portion of this brief or made any monetary contribution to its preparation or submission. Petitioner and Respondent have both consented in writing to the filing of this brief.

SUMMARY OF ARGUMENT

A decade ago, when this Court last considered the constitutional safeguards available to *habeas* petitioners with persuasive claims of actual innocence, it noted that such claims were "extremely rare." *Schlup v. Delo*, 513 U.S. 298, 321 (1995). Without question, the criminal justice landscape has changed dramatically in the intervening decade. DNA technology – aptly described by former Attorney General John Ashcroft as "nothing less than the truth machine of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent"[1] – has since freed dozens of citizens from our nation's prisons and death rows, scientifically proving their innocence beyond any doubt. And while it remains true in the years since *Schlup* (thanks largely to state officials' acceptance of the probative value of DNA evidence) that federal habeas proceedings are not the primary forum in which such exonerations occur, these cases have nonetheless provided irrefutable proof that wrongful convictions are far less "rare" than anyone – including advocates for the innocent – ever imagined.

Yet the DNA "revolution" has done more than reveal that our nation has, with troubling frequency, sent innocent citizens to prison and death row. It has also exposed grievous flaws and shortcomings of various "old" methods of forensic science, ones that directly caused many of these wrongful convictions.[2] This fact – and the lower courts'

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[1] Naftali Bendavid, *U.S.targets DNA backlog; Agency to spend $30 million to aid state crime labs*, CHICAGO TRIBUNE, Aug. 2, 2001, at N10.

[2] *See* Michael J. Saks and Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 5 SCIENCE 892, 893-95 (2005) (describing how post-conviction DNA exonerations have exposed widespread error in other, more rudimentary forensic sciences, and surveying "worrisome data" on high error rates in those other disciplines). For example, 21 of the first 130 post-conviction DNA exonerations (16.15%) involved convictions obtained in reliance on

need for direction as to how such new scientific evidence should be weighed in the *Schlup* analysis – makes it critical that this Court reverse the dangerous precedent set by the Sixth Circuit majority in the instant case.

Specifically, DNA has revealed a finite but troubling class of convictions tainted by what is best described as "false facts": forensic evidence that likely carried great weight with the original jury, but which is now known, to a scientific certainty, to have been erroneous. Most commonly – as in Petitioner's case – such "false facts" are revealed by DNA tests proving that the defendant was not, in fact, the source of critical biological evidence recovered from the crime scene, despite trial evidence to the contrary. In the instant case, the jury was told by an expert witness for the prosecution that the defendant was "definitely" a potential donor of semen on the victim's clothing, because he shared the perpetrator's distinct blood type and "secretor status"– yet DNA has now definitively excluded him as the source. Because these "false fact" discoveries involve unassailable science that would be, with good reason, enormously persuasive to a jury on retrial, they cast the *Schlup* inquiry (into whether "reasonable jurors" would likely find a reasonable doubt about guilt) in an entirely new light. Indeed, because of the public's widespread acceptance of DNA evidence, and its inherent objectivity and precision, the very considerations that usually counsel against permitting

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microscopic hair "matches." *See* Barry Scheck, Peter Neufeld, and Jim Dwyer., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 365 (New American Library ed., Dec. 2003). Nor is the problem limited to shoddy work by ill-trained criminalists. Indeed, studies comparing the findings of the world's leading microscopic hair examiners to DNA test results have had equally disturbing results. *See, e.g.*, Max Houck & Bruce Budowle, *Correlation of Microscopic and Mitochondrial DNA Hair Comparisons*, 47 J. FORENSIC SCI. 5, at 964-967 (Sept. 2002) (in 11% of cases studied, mitochondrial DNA testing proved that hairs which FBI examiners had found to be microscopically consistent with one another did not, in fact, come from the same source).

habeas petitioners to raise post-conviction challenges to their convictions – such as accuracy over time, and the need for public confidence in the outcomes of criminal cases – strongly work in favor of relief in this context.

The *en banc* majority in *House* failed to perceive this critical distinction and its legal significance under this Court's precedents. In denying relief, it crafted a new rule which – if allowed to stand – could jeopardize the legitimate claims of a significant number of innocent persons in prison and on death row. That error requires this Court's sure and swift correction -- particularly because, in this case, some of the scientific "facts" presented to the jury were not just false, but fraudulent (*see* Point III, *infra*).

Fortunately, most State officials have come to grasp the probative value of DNA evidence and other advances in forensic science, and will simply consent to grant relief when presented with a compelling case such as this one. As such, they take seriously the maxim that "the law must serve the cause of justice," and their own "duty to vindicate [the] interest" of a citizen whom they have reason to believe was wrongfully convicted. *Dretke v. Haley*, 541 U.S. 386, 399-400 (2004) (Kennedy, J., dissenting). But in the tiny fraction of such cases in which a federal court must vindicate that interest, the continued viability of *Schlup* is absolutely critical. So, too, is an unequivocal holding by this court that a "truly persuasive showing" of actual innocence would, on its own, constitute a viable constitutional claim. *See Herrera v. Collins*, 506 U.S. 390, 417 (1993).

ARGUMENT

I. Post-Conviction Cases in Which Objective Scientific Evidence Proves the Falsity of Critical "Facts" Relied Upon By the Jury at Trial Should be Accorded Great Weight in the *Schlup* Analysis, a Principle the *En Banc* Majority Failed to Grasp

In denying relief to Mr. House, the Sixth Circuit concluded that a convicted person cannot pass through the *Schlup* "gateway" unless he effectively negates each and every item of evidence offered against him at the original trial -- no matter how persuasive his new evidence of actual innocence. As persuasively demonstrated in Petitioner's brief to this Court, that holding runs counter to the plain language (and any logical reading) of *Schlup*. Furthermore, when courts impose such an unduly high burden, they create a substantial risk that an innocent person may be executed or remain imprisoned. That error – combined with the truly impressive evidentiary showing of actual innocence by this Petitioner – is reason enough to reverse the decision below.

But this case crystallizes another recurring issue that has divided courts facing *Schlup* claims: Is there something about the nature of new scientific evidence of innocence – evidence that definitively disproves material facts offered by the State at trial – that is of distinct importance in the *Schlup* inquiry? Put another way, should objective, scientific proof that a conviction was obtained by reliance on "false facts" be entitled to heightened significance in deciding whether "it is more likely than not that no reasonable juror would have convicted" had the truth been known?

The answer is a resounding "yes." The reasons go to the heart of *Schlup*'s equitable doctrine, as well as the administration-of-justice concerns shared by both the majority and dissenters in that landmark case. And since DNA testing and other advances in forensic science are increasingly becoming the basis for meritorious claims of actual innocence – to an extent scarcely imagined when *Schlup* itself was decided – the time has come for this Court to squarely address its significance.

A. Public Confidence in the Outcome

Schlup's "gateway" is rooted in the equitable nature of the habeas writ. *See id.* at 319. In providing a limited forum for a habeas petitioner with strong evidence of actual

innocence to adjudicate otherwise-untimely claims of constitutional error, the *Schlup* Court balanced the constitutional imperative against execution of the innocent (the "fundamental miscarriage of justice exception" to procedural default) against considerations of finality, comity, and the orderly administration of justice. *See id.* at 324-25. This Court and the Circuits have since applied *Schlup*'s "gateway" in non-capital cases as well. *See, e.g., Bousley v. United States,* 523 U.S. 614, 624 (1998).

Two years earlier, those same concerns led to the denial of relief in *Herrera v. Collins*, 506 U.S. 390, 404-05 (1993), in which the Court rejected the merits of the petitioner's "freestanding" actual innocence claim, while assuming that "a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional" and warrant habeas relief. *Id.* at 417. Six Justices in *Herrera* went further, asserting the position that truly persuasive "freestanding" innocence claims would clearly be cognizable. *See id.*, 506 U.S. at 419-20 (O'Connor and Kennedy, J.J., concurring); *id.* at 430 (White, J., concurring in the judgment); *id.* at 430-31 (Blackmun, Stevens, and Souter, J.J., dissenting).

What tipped the equitable scales in *Schlup* – and renders it consistent with *Herrera* – was the principle that constitutional error at trial, coupled with a strong showing of innocence, so undermined "confidence in the outcome" as to merit less deference on habeas review. *Id.* at 315, 317. That principle also guided the Court in its selection of the standard to govern "gateway" claims. *Id.* at 325 ("a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks [it] should have" in the verdict) (internal citation omitted). To that end, the *Schlup* test imposes "less of a burden" on petitioners than would be required for a *Herrera* claim of innocence arising from an "error-free" trial. *Id.* at 315-16.

Scientifically proven "false facts" should be governed by

the same principles. For while the error here is factual, rather than "legal," the potentially devastating impact on public confidence in the system if the error goes uncorrected is arguably greater – particularly when the same new evidence that exposes the falsity supports a viable claim of innocence. Jurors are known to give less weight than lawyers to perceived legal "technicalities," but are highly troubled when false scientific evidence may have tainted a conviction.[3] It is thus hard to imagine that a hypothetical reasonable juror would not find scientific "false fact" cases to fall within that "narrow class . . . implicating a fundamental miscarriage of justice." *Schlup*, 513 U.S. at 315 (internal citation omitted).

The high value conferred on truth and accuracy in the outcome of a criminal trial is by no means confined to laypersons, of course; it has long been one of the central tenets of this Court's criminal procedure jurisprudence. *See, e.g., Tehan v. United States ex rel. Shott,* 382 U.S. 406, 417 (1966) ("The basic purpose of a trial is the determination of truth"); *Williams v. United States*, 401 U.S. 646,653 (1971)

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[3] *See, e.g.,* Phoebe Zerwick, *Mixed Results: Forensics, Right or Wrong, Often Impresses Jurors*, WINSTON-SALEM JOURNAL, Aug. 29, 2005, at A1 (reviewing series of North Carolina cases in post-DNA era in which new forensics disproved trial evidence, and discussing strong impact of forensic evidence on jurors generally); Tammy Fonce-Olivas, *Juror says scientist influenced Moon case rape verdict*, EL PASO TIMES, Dec. 23, 2004, at 1A (quoting juror in 1987 rape trial of Brandon Moon, after his exoneration by DNA evidence, that subsequently-discredited serology evidence was "the majority" of what led jury to convict, as it was "what placed [Moon] at the scene more than anything else."); Roma Khanna, *Jurors Say Lab Data Was Crucial; flawed evidence a large role in their decision in Rodriguez case,* HOUSTON CHRONICLE, Oct. 21, 2004, at B1 (quoting jury foreman from 1998 rape trial of George Rodriguez, later exonerated by DNA evidence and proof that serology testimony at trial was erroneous; foreman opined that original serology testimony had been "necessary" to jury's decision to convict Rodriguez, and that "we probably would have acquitted him" without it).

(impairment of the trial's "truth-finding function" is of primary concern, warranting retroactive imposition of new constitutional rules, where defects in procedure raise "serious questions about the accuracy of guilty verdicts").

Further support for the proposition that such claims deserve special recognition under *Schlup* can be found in this Court's precedents concerning the use of fabricated evidence in criminal trials. This Court has long held that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (citing *Mooney v. Holohan*, 294 U.S. 103 (1935)). Proof of deliberate fabrication requires that the conviction be set aside unless the impact of the false evidence was truly harmless, *i.e.*, if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (citing authorities). That is an even more exacting burden for the State to meet than when its officials deliberately withhold material, exculpatory evidence from the defense. *See, e.g., United States v. Bagley*, 473 U.S. 677, 682 (1985) (reversal warranted where there exists a "reasonable probability" that the jury's verdict "would have been different" had the material evidence been disclosed).

Notably, a successful showing under both lines of cases requires proof of some sort of intentional misconduct on the part of state actors, whether withholding material exculpatory evidence or manufacturing false testimony. But the difference in the two standards makes clear that there is something particularly offensive about allowing convictions predicated on patently false evidence to stand -- because the public cannot (and would not) tolerate it. This is not to say that proof that a trial was tainted by "false facts" under *Schlup* would automatically entitle a petitioner to the generous standard of review in this Court's fabrication-of-

evidence cases.[4] But the doctrinal foundation of those cases provides compelling grounds to give objective, scientifically proven "false facts" great weight in the *Schlup* analysis.

The impact of new scientific evidence on public confidence in the outcome of a criminal trial was not before the Court in *Schlup* or *Herrera*, nor has the Court addressed it in the intervening decade. But given the extent to which remarkable advances in DNA technology have transformed the adjudication and outcome of criminal cases – and the fact that new scientific evidence comprises such a notable portion of this Petitioner's claim of innocence – this case is an appropriate one in which to recognize its high probative value, and reverse the decision below accordingly.

B. Impact on Other "Inculpatory" Evidence

Objective, scientifically proven "false facts" invariably do more than invalidate "old" forensic testimony relied upon by the jury. They also transform how jurors view the entirety of the prosecution's case, including both forensic and non-forensic evidence. This is most clearly demonstrated in what is viewed as the "simplest" of DNA cases: a sexual assault by a single perpetrator, in which the victim was not otherwise sexually active (*i.e,* all parties agree that semen from the victim's body came from the rapist). In-court identification testimony by the victim at trial ("I'm positive he's the one who raped me") is well known to have an enormous impact on juries – and, in the

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[4] Among other distinctions, *Napue* and *Mooney* were cases on direct appeal, whereas *Schlup* claims arise, by definition, in the context of federal habeas. In that context, this Court has required a Petitioner to show prejudice from the constitutional violations, rather than placing the burden on the state to prove the error harmless. *See e.g., Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993). Nor is *amicus* asking this Court to alter the substantive test of *Schlup* itself. But the fabrication line of cases, and the vast impact on the justice system caused by DNA and other forms of new scientific evidence, certainly suggest that great weight should be given to such evidence when determining whether a Petitioner satisfies *Schlup's* "no reasonable juror" test.

pre-DNA era, it was often "confirmed" by serological analysis of the rapist's blood type. Yet over 75% of DNA exonerations to date have involved rape convictions that were overturned upon conclusive, DNA evidence of innocence, despite the victim's eyewitness testimony at the original trial. In such cases, DNA tests revealing that the defendant was not the source of the semen immediately cast the once-"certain" identification in a wholly new light. It does not "erase" the victim's original testimony, of course, but eviscerates its persuasive force, by providing scientific proof that she was honestly, but tragically, mistaken.

For a prime example, one need look no further than a case which had earlier reached this Court's own docket: *Arizona v. Youngblood*, 481 U.S. 51 (1989). In *Youngblood,* this Court held that, absent proof of bad faith, the Due Process Clause was not violated by a State's failure to preserve potentially exculpatory evidence in its custody – in that case, semen-stained clothing from the sexual assault of a child. In denying relief, one member of this Court took pains to note that Mr. Youngblood was unlikely to have been prejudiced by the evidence destruction, given what appeared to be "overwhelming" evidence of his guilt at trial. *Id.* at 60 (Stevens, J., concurring in the judgment). That evidence included the fact that the child victim who identified Youngblood in lineup had spent a full one-and-a-half hours in the perpetrator's presence, in broad daylight. He had also initially described the rapist as a black man with a defective right eye – a seemingly telling link to a "bad eye" of Youngblood's own. *See State v. Youngblood*, 790 P.2d 759, 761 (Ariz.App.1989). The fact that Youngblood's defect was in his left eye, not his right, was seen as but a minor discrepancy in an otherwise solid identification. But when a cotton swab containing the rapist's semen was located and DNA tested a decade later, the results squarely proved Youngblood's innocence – and ultimately identified the real perpetrator, Walter Cruise, a pedophile who did, in fact, have

a defective left eye.[5] Viewed in light of the DNA evidence, then, the in-court identification that had seemed so powerful at the time of trial was shown to be utterly mistaken.

The power of "false facts" to alter the evidentiary landscape holds equally true in more complex cases. *Amicus* has represented dozens of clients against whom evidence in the trial record appeared massive – until DNA test results proved otherwise, generating what scientists have aptly described (in other contexts) as a "paradigm shift."[6] In these cases, a single new key fact can radically change the lens through which all of the "overwhelming" trial evidence – and the culpability of the defendant – is viewed.

Kirk Bloodsworth, for example, was convicted and sent to Maryland's death row for the rape-murder of an eight-year-old girl in 1985. Five separate eyewitnesses testified that Bloodsworth was the man seen with the victim just prior to her death. Were that not enough, the jury also heard that (a) a shoeprint near the body was the same size as Bloodworth's own; and (b) while being interrogated, he had revealed knowledge of a "bloody rock" at the crime scene – a detail then known only to police. Indeed, prosecutors were so convinced of Bloodsworth's guilt that even after DNA tests excluded him as the source of semen on the girl's underwear in 1992, they only conceded they were bound to reverse his conviction, but did not concede his innocence. It was not until ten years later, when DNA yielded a databank "hit" on the real killer – a convicted pedophile – that they did so, and belatedly apologized to Bloodsworth. By then, the evidentiary house of cards had truly fallen apart –

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[5] *See* David L. Teibel, *Man Gets 24 years in '83 Child-Sex* Case, TUSCON CITIZEN, Aug. 20, 2002; Scheck et. al., Actual Innocence 334-35.

[6] See Thomas S. Kuhn, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 150 (Univ. of Chicago Press 3d ed. 1996); *see also id.* at 10-11 (defining "paradigm" concept in scientific theory) and 92-93 (same); Saks & Kohler, *The Coming Paradigm Shift in Forensic Identification Science*, at 893.

revealing that the eyewitnesses (including heavily-coached children) were all mistaken; the same-sized shoeprint near the body a mere coincidence; and Bloodworth's "knowledge" of the bloody rock a fabrication by the police.[7]

A similarly "overwhelming" evidentiary record appeared to mark the 1988 trials of ***Ron Williamson and Dennis Fritz*** in Oklahoma, before DNA testing conducted on semen and hair evidence from the rape/murder victim exonerated them in 1999. Jurors had convicted both men, sentencing Williamson to death, after hearing the account of a man named Glenn Gore that he saw Williamson at the victim's workplace just before her murder; the testimony of three fellow inmates that the men had made admissions to the murder; that the victim had told a friend that the men "made her nervous"; and statements Williamson made in custody about a vivid "dream" of the crime. The state's experts also claimed that a total of 17 hairs from the crime scene "matched" Fritz or Williamson, and that both men were possible contributors of sperm inside the victim. Yet the same DNA tests that later excluded the men as the source of this evidence also provided a DNA link to the true perpetrator – the state's informant, Glenn Gore – thus exposing him and the other "snitches" as liars, and the statements the defendants allegedly made about the crime to be innocuous or invented.[8] (Given the interrelated concerns of due process and actual innocence at the heart of both *Schlup* and *House*, it is also of note that while these men ultimately secured the new DNA test results that proved their innocence in state court, Williamson – who, while on death row, once came within five days of execution – lived to see

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[7] Convicted by Juries, Exonerated by Science, NAT'L INSTIT. JUST., U.S. Dept. Just., NCJ161258 (June 1996) at 36; James Dao, *In Same Case, DNA Clears Convict and Finds Suspect*, N.Y. Times, Sept. 6, 2003, at A7.

[8] *See* Charles T. Jones, DNA Tests Clear Two Men in Prison Escapee Sought in Slaying of Waitress, DAILY OKLAHOMAN, April 16, 1999, at 1; Scheck et. al., ACTUAL INNOCENCE 163-202

his ultimate exoneration only because a federal *habeas* court had earlier reversed his conviction and sentence on constitutional grounds.)[9]

Other DNA cases have revealed that the original trials were tainted by flawed forensics – whether an entire analytic discipline that can only be deemed "science" if preceded by the word "junk," or by grievous casework errors within established fields of forensic analysis. ***Ray Krone of Arizona*** was the victim of a junk science dubbed "forensic odonotology," in which a defendant's dental impressions are allegedly "matched" to the bite marks left on a crime victim. Dubbed "the snaggletooth killer" and sent to death row for the murder of a waitress whose killer bit her breast, he was exonerated by DNA testing a decade later that excluded him from the bite mark's saliva stains (and which, as in the Bloodsworth case, was matched to the DNA of a convicted sex offender about to be paroled). Krone's exoneration has been followed by broader scientific studies and journalistic exposes revealing the entire "discipline" of forensic odontology to be rife with error.[10]

In a different but no less troubling vein, ***Stephan Cowans***

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[9] *See Williamson v. Reynolds*, 904 F.Supp. 1529 (E.D. Okla. 1995) (reversing conviction and sentence on various constitutional grounds, including, *inter alia*, that trial counsel was ineffective for failure to investigate evidence that state's witness Glen Gore was true perpetrator of the rape/murder), *aff'd*, *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997).

[10] *See* Flynn McRoberts & Steve Mills, *Forensics Under the Microscope: Testimony on Bite Marks Prone to Error*, CHICAGO TRIBUNE., Oct. 19, 2004, at C1 (surveying wrongful convictions predicated on erroneous bitemark analysis); C. Michael Bowers, *The Scientific Status of Bitemark Comparisons*, in Modern Scientific Evidence and the Law, 541 (ed. David Faigman, et al., 2005) (reporting, *inter alia*, "false positive" errors in bitemark analysis by 63.5% of most highly-credentialed "diplomate" examiners in blind study); K.L. Arheart & I.A. Pretty, *Results of the 4th ABFO Bitemark Workshop—1999*, 124 FORENSIC SCI. INT'L 104, 111 (2001) (reporting further on unacceptably high error rates in cases studied).

of Massachusetts was convicted of shooting a police officer, largely because two separate crime lab analysts "matched" his fingerprint to one from the crime. But when post-conviction DNA evidence proved Cowans' innocence, it also exposed serious errors by both print analysts -- leading the Boston Police Department to shut down its entire print division last year. Similarly, the 2001 exoneration of ***Michael Green of Ohio*** revealed that the serology testimony offered by a police crime lab official at his rape trial as damning evidence of guilt was in fact tainted by fraud.[11]

With good reason, then, the "ripple effect" of new evidence of innocence was not lost on the *Schlup* court. *See id.* at 330 (noting that "under the gateway standard we describe today, the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial.") Yet the *en banc* majority in *House* failed to grasp this principle. By holding that Petitioner must "do more" than merely "raise questions about the reliability of portions of the trial testimony or the manner in which physical evidence was handled or analyzed," *House v. Bell*, 386 F.3d 668, 685 (6th Cir. 2004)(emphasis supplied), the court improperly viewed the new evidence in isolation – and denied the Petitioner the powerful inferences to which he was entitled.

For this case is one in which DNA and other advanced forensic evidence does more than just "raise questions" about "portions" of the trial evidence. It directly proves the falsity of key "facts" presented to the convicting jury, and its impact reverberates throughout the trial record. Most critically, by definitively proving that Petitioner was not the source of the semen stains on the underwear and nightgown worn by the victim, the DNA test results eviscerate the entire

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[11] *See* Mark Gillespie, *Experts fault job done by police tech lab, boss,* CLEVELAND PLAIN DEALER, June 16, 2004, at A1 (reporting City of Cleveland's agreement to have panel review over 100 serology cases handled by police lab analyst who gave false testimony in rape case of Michael Green).

motive for the crime and theory of guilt upon which the prosecution asked the jury to convict (*i.e.*, that he lured Mrs. Muncey to a secluded area for purposes of sexually assaulting her, then killed her when she "resisted" him).[12] Similarly, the State Medical Examiner's new analysis of the enzyme degradation on Petitioner's blood-stained blue jeans, coupled with the undeniable evidence of substantial blood spillage from the autopsy test tubes, does far more than just show that this blood could not have come from the victim's veins at the time of her murder. For if Mrs. Muncey's blood was not on Petitioner's jeans the night she was killed, and Petitioner's semen was not on her clothing, the value of the stains as "corroboration" for the eyewitness who claimed to have seen him at the crime scene is also eliminated. And with both of these forensic "facts" no longer part of the trial record, a reasonable jury would be far more likely to credit Petitioner's innocent explanation for how he incurred his minor injuries that night – not to mention the overwhelming new evidence inculpating the victim's husband (including Mr. Muncey's motive, attempts to fabricate an alibi, and credible confessions to two members of the community).

Simply put, it is impossible for a reviewing court to correctly make "a probabilistic determination about what reasonable, properly instructed jurors would do" (*Schlup*, 513 U.S. at 329), if it considers each item of evidence in isolation, and does not consider the potentially far-reaching impact of the new evidence on the old. It is absolutely critical that this Court so instruct the lower federal courts, and avoid future error in this small but critical class of cases. *See id.* at 324-25 ("The quintessential miscarriage of justice is the execution of a person who is entirely

[12] Indeed, the State told the court at sentencing that "the fact that there was semen on the outer garment, that is, the nightgown" was its basis for seeking the death penalty, as it would support a finding that House murdered the victim "in the process of either rape or attempted rape." *House*, 386 F.3d at 693.

innocent")(internal citations omitted).

C. On "Finality": Memories May Fade, but DNA Does Not

This Court has long wrestled with the often-competing interests of finality, accuracy, and actual innocence when considering whether reversal of a conviction is warranted. *See, e.g., United States v. Mechanik et. al.,* 475 U.S. 66 (1986) (While "[t]he passage of time, erosion of memory, and dispersal of witnesses may make retrial difficult, even impossible . . . . [t]hese societal costs of reversal and retrial are an acceptable and necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of guilt or innocence") (internal citations omitted). Indeed, the *Schlup* court noted a "threat to finality" inherent in any rule that facilitates habeas relief. *Id.* at 326. And among the chief obstacles before the petitioner in *Herrera* was the Court's view that post-conviction factfinding was, by its very nature, less accurate than the original trial. *See* 506 U.S. at 403 ("[T]he passage of time only diminishes the reliability of criminal adjudications").

However true this maxim may have been in 1993, it is clearly no longer so in the DNA era. Indeed, it is precisely because DNA test results are more objective, discriminating, and accurate than lay evidence – even decades after a crime – that access to post-conviction DNA testing has expressly overridden the ordinary rules of "finality" at both the state and federal level. As noted by the Justice Department's National Commission on the Future of DNA Evidence:

> The results of DNA testing do not become weaker over time in the manner of testimonial proof. To the contrary, the probative value of DNA testing has been steadily increasing as technological advances and growing databases amplify the ability to identify perpetrators and eliminate suspects. . . . The strong presumption that verdicts are correct, one of the underpinnings of restrictions on post-conviction relief, has been weakened

by the growing number of convictions that have been vacated by exclusionary DNA test results.

POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS, Nat'l Instit. Just., U.S. Dept. Just., NCJ 177626 (Sept. 1999).

Scientific proof exposing "false facts" in a trial record is thus analytically distinct from virtually all other forms of post-conviction claims. In such cases, a court need not choose between fact-finding accuracy and due process, as both interests may be served by passage through *Schlup*'s gateway. The erasure of that dichotomy in this distinct class of cases should, in turn, send a clear message to lower courts that such evidence is entitled to substantial weight in determining what the verdict of "reasonable jurors," fully armed with this irrefutable science, would be.

This is not to say that scientific-evidence cases are the only ones in which a Petitioner can make a compelling claim of actual innocence needed satisfy *Schlup* or *Herrera*. Since only 5-10% of all felonies in the U.S. involve biological material that can be subjected to DNA testing,[13] it bears emphasizing that reliance on DNA and other forensic evidence is but one – and by no means the only – way to pass through *Schlup's* gateway. The lower courts have, with good reason, required that lay evidence be accompanied by truly powerful indicia of reliability when offered years after trial. But a limited number of innocent petitioners have succeeded in meeting that burden. *See, e.g., Bragg v. Norris*,

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[13] *See, e.g.,* Testimony of Michael M. Baden, M.D., director of the Medicolegal Investigations Unit of the New York State Police, before the United States Senate Committee on the Judiciary, July 31, 2003,available at http://judicary.senate.gov ("In less than 10% of murders the criminal leaves DNA evidence behind. About 5% of a crime lab's workload involves DNA analysis"); Kelly M. Pyrek, *Consortium Lobbies Capitol Hill on Behalf of Forensic Science Community*, FORENSIC NURSE, Sept. 2005 (quoting chair of consortium of four major crime laboratory associations that pool of requests for DNA analysis is "only five percent of what comes in the door").

128 F.Supp.2d 587 (E.D. Ark. 2000) (new evidence included sworn testimony from law enforcement officials, and corroborating photographs and law enforcement records, which directly contradicted statements of undercover officer who gave critical but false testimony at petitioner's narcotics trial); *Reasonover v. Washington*, 60 F.Supp.2d 939 (E.D. Mo. 1999) (in murder conviction obtained principally through testimony by jailhouse informants regarding petitioner's alleged admissions, new evidence included taped conversations surreptitiously recorded by state officials which contradicted jailhouse informants' claims and corroborated petitioner's denials, as well as documents indicating undisclosed benefits to lead informant given in exchange for testimony).

The instant case, however, is one in which such scientific evidence is available. And its impact on the verdict cannot be overstated. Indeed, that a retrial would now provide Petitioner's jury with more objective and reliable forensic evidence than was available in 1986 cannot seriously be disputed. The principal reason, of course, is the newly proven "false fact" regarding the semen stains that would no longer taint the jury's deliberations. The original jury was told by an FBI analyst that Petitioner (but not the victim's husband) was "definitely" among the small minority of men who shared both the blood type and secretor status of the semen donor, and thus could well have been its source. But as the *House* majority conceded, DNA has now proven – to an absolute scientific certainty – that neither stain came from Petitioner, and that both stains in fact came from the victim's husband, whom Petitioner has long contended was the real killer. *See House*, 386 F.3d at 687. Similarly, the majority's concession that Petitioner "succeeded in showing . . . that, at some point, the blood evidence appears to have been mishandled, resulting in spillage," *id.*, vastly understates the power of the new evidence, as well as the impact the original (false) blood evidence surely had on the jury's deliberations.

The uniquely probative and "timeless" nature of such proof makes it imperative that this Court correct the *House* majority's failure to give it due significance under *Schlup*. For in future cases, no matter how powerful the DNA or other forensic proof, there will invariably be some "old evidence" left standing from the trial (whether the specious claim of a jailhouse snitch, or the honest but mistaken recollection of an eyewitness). Yet the *House* approach could well erect an insurmountable bar to relief in future meritorious cases, whenever a prosecutor unreasonably contests a defendant's claim of innocence – no matter how weak the evidentiary straws within the State's grasp may be.

II. This Court Must Ensure a Meaningful Federal Safeguard Against Wrongful Imprisonment and Execution for the Small but Critical Minority of Innocent Persons With Exculpatory DNA or Equally Compelling Post-Conviction Evidence, but to Whom Prosecutors and State Courts Unreasonably Deny Relief

Despite the revolutionary impact of DNA technology on the justice system in recent years, the pages of the Federal Reporter are not replete with DNA exoneration case law. The reason is that this technology has so quickly gained acceptance among State officials – who recognize its power both to identify the guilty and exonerate the innocent – that most claims for post-conviction relief based on DNA evidence never reach the federal *habeas* courts, because relief is granted at the state level. Indeed, in the overwhelming majority of such cases handled by *amicus* and our colleagues to date, the defendants' exonerations have transpired on the full consent of the prosecution. There are also a small minority of cases in which the underlying conviction is vacated on consent, but the prosecution reserves the right to conduct a retrial – as, of course, the State would be free to do here.[14] But *amicus* knows of no

[14] *See, e.g., Brewer v. State*, 819 So.2d 1169 (Miss. 2002) (remanding for

case to date with a result like *House*, in which both prosecutors and courts have failed to grant so much as a new trial despite the presence of (a) DNA and other new forensic evidence that proves the falsity of key "facts" heard by the jury at trial, and (b) a broad array of testimonial proof regarding an alternate suspect's motive, fabricated alibi, and contemporaneous confessions.

It becomes even clearer that the *House* majority stands as an "outlier" among its peers when the case is compared to analogous rulings in both state and federal courts. State courts, for example, have properly granted new trials based on other newly discovered forensic evidence – even where the science at issue is far less advanced and persuasive to juries than DNA. *See, e.g., State v. Behn*, 868 A.2d 329 (N.J. Super. Ct. App. Div. 2005) (reversing convictions for murder and armed robbery, based upon new scientific studies demonstrating unreliability of method of chemical analysis of lead bullets, used at trial to link partial box of bullets in defendant's possession to bullets in victim's corpse); *Alabama v. Banks*, 845 So.2d 9 (Ala.2002) (reversing conviction for murder of wife's newborn baby, based on new evidence that a prior tubal ligation likely precluded the alleged pregnancy, contradicting medical evidence at trial); *State v. Caldwell*, 322 N.W.2d 574 (Minn. 1982) (vacating murder conviction based on re-analysis of enhanced crime scene fingerprint, alleged at trial to have been defendant's, which upon closer review excludes him); *People v. Jackson*, 283 N.W.2d 648 (Mich. App. 1979) (new evidence that semen on victim's underwear is from non-secretor, while

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evidentiary hearing on new trial for death row inmate Kennedy Brewer, convicted of strangulation of 3-year-old child, after DNA excluded him from semen in girl's body) *and* Sherri Williams, *DNA Wins Inmate New Trial*, THE CLARION-LEDGER, Sept. 6, 2002, at B1 (reporting prosecutor's subsequent consent to vacate Brewer's conviction, remarking, "If you follow the law on newly discovered evidence, [the DNA] would be possibly something that would change the jury's verdict," but that State may retry Brewer pending further review.)

defendant is a secretor, would "render a different result probable on retrial"); *see also State v. Pope*, 80 P.2d 1232 (Mont. 2003) (in two-perpetrator, two-victim rape case, DNA excluding Pope warranted vacatur); *People v. Waters*, 328 Ill.App.3d 117 (2002) (same, in three-perpetrator rape case, where defendant was alleged to have urinated on victim, yet DNA excluded him as source of urine).

Similarly, in those rare cases when convicted persons with new, exculpatory DNA test results have been required to pass through *Schlup*'s gateway to obtain relief, the district courts have largely concurred. In *Watkins v. Miller*, 92 F.Supp.2d 824 (D.Ind. 2000), for example, the District Court of Indiana granted relief to a defendant convicted of rape and murder, after post-conviction DNA tests conclusively excluded him as the donor of the semen in victim's body. The state contended that a reasonable jury could still convict based on the defendant's "confession" to a jailhouse informant, which the informant had not recanted, under the new theory that he committed the murder with another man – even though the prosecution had argued at trial that "[t]here is no evidence whatsoever that anybody else ever molested" the victim. The court granted relief under *Schlup* (and the underlying *Brady* claim in his habeas petition), noting, with respect to the Schlup claim, that the new DNA evidence "changes the picture completely" and "conclusively disproves the only theory the state presented at trial." *Id.* at (Mr. Watkins was ultimately exonerated and freed from prison after the state did not re-prosecute him). *See also Nickerson v. Roe*, 260 F.Supp.2d 875 (D.Cal. 2003) (DNA on blood-stained glove from robbery-murder excluded defendant as source; although two eyewitnesses had identified defendant as one of three perpetrators fleeing scene, the co-defendant implicated by DNA and the two other charged defendants each affirmed that they acted alone and that Nickerson was not a participant in crime).

This is not to say that federal *habeas* courts always get it

right where DNA and innocence is concerned. In *Hunt v. McDade*, 205 F.3d 1333 (4th Cir. 2000), for example, the Fourth Circuit affirmed the denial of relief under *Herrera* to Darryl Hunt of North Carolina, who had been convicted of rape and murder in 1984 based on the highly questionable testimony of purported "eyewitnesses," with his alibi corroborated by multiple others – even though post-conviction DNA testing conclusively proved he was not the source of semen from the rapist-murderer found in the victim's corpse, and the case had been tried on a single-perpetrator theory. It was only after Mr. Hunt's habeas petition was dismissed, but retesting of the DNA allowed the unknown male profile to be entered into the national DNA databank, generating a "hit" on the real perpetrator – who confirmed that he had in fact acted alone, and that Hunt was entirely innocent – that the unfortunate error in the 4th Circuit's grudging application of *Herrera* was established.

By and large, however, the decision now under review is – fortunately – a notable exception among its peers. But the fact that the State's refusal to grant Mr. House a new trial is patently unreasonable, and the *en banc* court's reasoning outside the norm, does not mean that the opinion will not have far-reaching implications if allowed to stand. Indeed, a number of *amicus*' clients wrongfully convicted of capital murder would not be alive, let alone free men today had the Sixth Circuit's tortured reading of *Schlup* governed their cases. Moreover, as has recently been noted by legal and lay commentators, "pockets of resistance" are emerging among a small minority of prosecutors' offices, as they begin to steadfastly resist requests for DNA testing (even where it can unquestionably establish innocence or confirm guilt), or try to erect new procedural barriers to hearings on the significance of exculpatory DNA results.[15] While such

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[15] *See* Adam Liptak, *Prosecutors Fight DNA Use for Exoneration*, N.Y. TIMES, Aug. 29, 2003, at A1; Carl Hiaasen, Editorial, *Still Behind Bars, Despite DNA Evidence*, THE MIAMI HERALD, May 9, 2004, at 1L

efforts have been widely deplored by commentators and many other law enforcement officials,[16] the *Schlup* gateway remains a crucial safeguard for that small – but undeniably critical – minority of innocent persons for whom state court processes fail to provide relief. This may be particularly so given that *Schlup*-eligible cases involve claims of constitutional error at trial, thus providing an incentive for some state actors to block the "gateway," *i.e.*, to prevent claims of egregious misconduct from being adjudicated on their merits (and subsequent civil actions if serious constitutional violations are established).

The legal issues posed by this finite class of "false fact" cases were barely on the horizon when *Schlup* was originally decided. Now, however, this Court can squarely address them, and in so doing reaffirm our Constitution's venerable tradition of protecting the innocent -- without fear of opening the floodgates to large numbers of such claims.

III. Evidence of Fraud and Fabrication by the State's Serology Expert at Trial, Recently Discovered by *Amicus*, Gives Still Further Weight to Petitioner's Constitutional Claims

Many "false fact" cases in the DNA context are the result of advancements in forensic science, not a revelation of bad faith on the part of the original crime lab analyst. That is, the original "fact" presented to the jury was supported by laboratory work which, even if rudimentary, was valid at the

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(quoting State's assertion, to appellate court at oral argument, that even if State knew that defendant was "absolutely innocent," he would be entitled to no relief).

[16] *See, e.g.*, William Sessions, *DNA Tests Can Free the Innocent. How Can We Ignore That?*, WASHINGTON POST, Sept. 21, 2003, at B02; *State Fought to Keep Innocent Man in Prison*, MIAMI HERALD, Aug. 15, 2004, at 1L; Editorial, *Innocence Lost Series*, ST. PETERSBURG TIMES, Aug. 22, 2004, at 2P ("When prosecutors are uninterested in evidence of a defendant's innocence, they have lost their professional way. They should not only lose their jobs but their license to practice law").

time of trial – *i.e.*, serology testing which showed that the defendant's blood type was the same as the one detected in the crime scene evidence, and thus the jury was (accurately and appropriately) informed that he was a potential donor, albeit one among many potential donors. The "falsity" is established when new, and infinitely more discriminating, DNA technology proves that he could not, in fact, have been the source. Often these DNA test results will radically transform the evidentiary landscape, and thus require a new trial, but will not impugn the lab work of the original analyst, who "did the best she could" with the technological limitations of the day.

This case, however, appears to be of a different sort. For when *amicus* reviewed the trial record to assess the full significance of the new scientific evidence, we discovered that the FBI serologist who analyzed the stains on the victim's underwear and nightgown, and compared them to the defendant's own blood type, appears to have wholly misrepresented the results of the original tests to the jury.

The State's expert testified, quite properly, that under the ABO blood group system, the 80% of the population who are "secretors" (that is, whose blood antigens are detectible in their other bodily fluids) secrete "H" antigens. Persons who are Types "A," "B," or "AB" secretors will, in addition, secrete the A and/or B antigens. The defendant, he found, was an "A secretor," and the victim herself was also blood type "A" (although, curiously, her secretor status was "not determined"). Hence, semen stains left by Petitioner should have revealed both "A" and "H" antigens. However, the state's expert found that the victim's semen-stained underwear yielded only "H" antigens, but no "A" antigens.

The combined test results, then, clearly posed a problem for the State, if it wished the jury to find that Mr. House was a potential donor of the semen. Since there were no "A" antigens detected in that stain, the results – if accurate – would have excluded him as the source. Here is how the

State fixed that problem when its serologist testified at trial:

Q: Can you tell us whether or not the A substance could have been there [in the semen stain], prior to you doing the testing?

A: It could have, yes.

Q: Does the age of the stain make a difference as to whether you find both of these substances?

A: The age of the stain does to some extent make a difference. The environment in which the stain remained after it was deposited could also make a difference. The H blood group substance is the precursor to the B and A blood group substances, chemically, and it can also be degraded from the A or the B to the H.

Q: Which means that the H lasts longer, so to speak?

A: In certain cases, yes.

Q: So, A could deteriorate into H?

A: Yes.

(Trial transcript ("TT") at 901) (emphasis supplied).

This is sheer nonsense. For while it is true that age and environment can cause bodily fluids to degrade to the point where no blood group antigens in a given sample can be detected at all, the selective degradation of only certain antigens described above -- a/k/a the conveniently "Vanishing A"-- is simply unheard of in the field of serology.[17] And it is certainly a rule that any remotely

[17] Indeed, if antigens could selectively "vanish," then serology would never have been a reliable method for drawing inculpatory or exculpatory inferences from the antigens' presence or absence in a piece of evidence (that is, the presence or absence of Type H, A or B antigens in a sample would tell us nothing about the potential donors, because one could never rule out the possibility that other antigens had been present but vanished. Fortunately, because the vanishing-antigen notion is unheard of in the field of serology, properly conducted blood type analysis was a useful vehicle to draw certain conclusions about perpetrators of crime for many

competent serologist employed by the FBI in 1986 would have known – as would a qualified serologist for the defense, had Mr. House's trial lawyer retained and instructed such an expert to conduct a thorough review of the FBI's results.

If the FBI's typing of the stain was accurate, the jury should have been told 20 years ago that Paul House, as an "A" secretor, was excluded as the source of the stain. The only logical explanation for this convenient "Vanishing A" theory offered by the State's expert witness is that it was fabricated to conform with the State's case against Paul House, *i.e.,* to fraudulently misrepresent the results to make him a potential donor of that semen stain, when the test results showed otherwise.[18]

And there is more. The FBI reportedly detected both "A" and "H" antigens on the semen-stained nightgown. From this, the analyst unhesitatingly opined that "the person who deposited that semen was blood type A." (T.899). This, too, is wrong. Since the deceased was type A, but the lab did not test her secretor status, she is presumptively a secretor (just like 80% of the population). Thus the FBI's analysis was incorrect, because all of the "H" and "A" blood group substance could have simply originated from the deceased victim herself, and thus the testing did not reveal any useful information about the donor of the semen. (For instance,

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years before it was supplanted by more discriminating DNA technology.

[18] It may be worth noting that this unheard-of "vanishing A" assertion by the State's expert at trial is quite different from the recognized phenomenon of post-mortem changes in blood enzymatic activity, which formed the basis for the Assistant Chief State Medical Examiner's assertion on habeas that the blood stains on Petitioner's blue jeans were tellingly consistent with the tubes of blood collected at the victim's autopsy. Indeed, in proceedings in the District Court, the State's expert agreed that the post-mortem process of hemolysis and environmental exposure can result in detectible changes to the enzymatic activity in a blood sample, and that the patterns of such degradation in the autopsy tubes was the same as that found in the blood on the jeans. *See* Transcript of Evid. Hearing, Feb. 3, 1998, at 140, 165-70.

"B" blood group substance from the semen could also have been present but not detectible if the semen was diluted by the victim's vaginal secretions, which contain only the "A" and "H" blood group substances.) For this reason, it is a core principle of forensic serology that when antigens in a mixed stain are wholly consistent with the victim's own, an analyst should never opine as to the blood type of the minor (male) contributor.[19] This means that, although the jury was told that the male donor was assuredly an "A secretor" like Paul House, it should instead have been told that it could have been any man on the planet.

We raise these troubling facts not to ask the Court to directly review the *Brady* and *Strickland* claims pled by Petitioner in the District Court. But they do provide powerful evidence that the *Schlup* gateway is essential here, to ensure these claims get a full and fair hearing in that forum before Petitioner is executed. Indeed, the fact that the serologist who gave this grossly inaccurate scientific testimony at trial is the very same expert the State relied upon at the habeas hearings to challenge Petitioner's scientific evidence regarding the suspicious enzymatic condition of the blood on Petitioner's jeans gives still further weight to his overall showing under *Schlup*. Clearly, this fraudulent serology, coupled with Petitioner's powerful claim of actual innocence – so strong that six Circuit Judges would have freed him from custody without delay, and a seventh would have granted granted the writ and ordered retrial – means that one cannot have the remotest

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[19] *See, e.g.*, U.S. Dep't of Justice, *Proceedings of Forensic Science Symposium on the Analysis of Sexual Assault Evidence*, Lib. Cong. Cat. No. 84-601146 (July 8, 1983) (reporting standards promulgated at FBI-sponsored symposium, on parameters for analysis of sexual assault evidence; panelists stated that in mixed samples, when all markers can be attributed to victim, an analyst may not opine as to source of semen); *see also* FS Baechtel, *Secreted blood group substances: Distributions in semen and stabilizing in dried semen stains*, 30 J. FORENSIC SCI. 1119 (1985) (same).

"confidence in the outcome" of this deeply flawed trial.

IV. This Court Should Correct the Misapprehension in the Lower Courts Regarding the Constitution's Ban on Execution and Imprisonment of the Innocent That Has Arisen Since *Herrera v. Collins*

This Court has never squarely addressed the issue of whether the 8th and 14th Amendments to the Constitution forbid the execution or continued incarceration of an individual who is actually innocent, separate and apart from any claim of constitutional error at trial. Yet this is a principle whose importance has become manifest in the last ten years, and in which *amicus'* clients have an undisputed interest. Former client Ron Williamson, for example, came within five days of execution and was measured for a coffin before a last-minute stay of execution was issued, and his innocence was proved through DNA testing.[20] And while this Court appeared poised to resolve that question in *Herrera v. Collins,* it ultimately determined that was not the appropriate case in which to issue such a ruling, given that a 6-3 majority found that Mr. Herrera would have fallen far short of the "extraordinarily high" factual showing required to sustain such a claim. *See Herrera*, 506 U.S. at 417.

But this Court has certainly never held otherwise – that is, that the federal courts would be powerless to intervene to prevent the execution of one who has, in fact, made a truly compelling post-conviction showing of actual innocence, if no state court relief were available. Indeed, in *Herrera,* the majority assumed without deciding that the federal Constitution does provide such core protection for the innocent on death row. *See id.* at 417 ("We may assume. . . . that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant

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[20] *See* Scheck et. al, ACTUAL INNOCENCE at 189.

federal habeas relief if there were no state avenue open to process such a claim.") And six Justices were even then prepared to go further and expressly so hold. *See id.*, 506 U.S. at 419-20 (O'Connor and Kennedy, J.J., concurring); *id.* at 430 (White, J., concurring in the judgment); *id.* at 430-31 (Blackmun, Stevens, and Souter, J.J., dissenting).

Unfortunately, despite clear assertions in *Herrera* itself that this issue was, at the very least, an open question – if not one the Court was all but ready to decide in the affirmative in the appropriate case – a number of lower courts have badly misread that decision. Based on the denial of relief to Herrera himself, and the attendant discussion in the majority opinion as to why post-conviction claims of innocence are generally disfavored (but hardly barred altogether) absent an "extraordinarily high" factual showing, some have read *Herrera* to foreclose such claims altogether, no matter how compelling the new evidence of innocence. *See, e.g., Sibley v. Culliver*, 377 F.3d 1196, 1207 (11th Cir. 2004); *LaFevers v. Gibson*, 238 F.3d 1263, 1265 n.4 (8th Cir. 2001). Other courts have appropriately held otherwise, either leaving the question open, or reading *Herrera* to recognize the viability of such a claim in a meritorious case. *See, e.g., Boyde v. Brown*, 404 F.3d 1159, 1168 (9th Cir. 2005); *Noel v. Norris*, 322 F.3d 500, 504 (8th Cir. 2003); *Conley v. United States*, 323 F.3d 7, 14 n.6 (1st Cir. 2003); *State ex rel Amrine*, 102 S.W.3d 541, (Mo. 2003); *Ex Parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Cr. App. 1996). And even some courts which do recognize the possibility of a "freestanding" actual innocence claim have read *Herrera* to limit its availability to capital cases. *See, e.g., Milone v. Camp*, 22 F.3d 693, 699-700 (7th Cir. 1994); *Ponder v. Lampert*, 2004 U.S. Dist. LEXIS 7646 (D. Or. 2004).

Given the remarkable increase in post-conviction DNA and other exonerations since *Herrera*, this issue is no longer – and should no longer be – theoretical. Dozens of recent exonerations of the innocent in both capital and non-

capital cases has revealed that even trials thought to be "error-free" have, on hindsight, at times led to the wrongful conviction of the innocent. And turning a blind eye to such legitimate cases is something that our Constitution – like the public at large -- cannot tolerate. *See Herrera*, 506 U.S. at 398 ("the central purpose of any system of criminal justice is to convict the guilty and free the innocent") (*citing United States v. Nobles*, 422 U.S. 225 (1975).

Given the high stakes and the decade that has passed since *Herrera*, this is not the sort of issue that should "percolate" any longer. While a number of state and federal courts have appropriately read *Herrera* to permit relief to be granted under truly extraordinary showings of actual innocence, it is constitutionally and morally unacceptable that whether an innocent person is executed may depend on the Circuit in which he is confined. It is thus critical that this Court make clear that such claims – while rare – are cognizable under the 8th and 14th Amendments. And while execution of an innocent person is our justice system's ultimate (and irreversible) nightmare, as *amicus'* clients can attest, the unimaginable ordeal of lengthy imprisonment for a crime one did not commit is no less a violation of the Constitution, and should be explicitly recognized as such by this Court. Finally, given the truly impressive array of <u>both</u> scientific and lay witness evidence of innocence that federal habeas counsel for Mr. House has presented, his case – unlike *Herrera* -- is a highly appropriate one in which to articulate the standard that governs such claims.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Petitioner's brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HOUSE *v.* BELL, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04–8990. Argued January 11, 2006—Decided June 12, 2006

A Tennessee jury convicted petitioner House of Carolyn Muncey's murder and sentenced him to death. The State's case included evidence that FBI testing showing semen consistent (or so it seemed) with House's on Mrs. Muncey's clothing and small bloodstains consistent with her blood but not House's on his jeans. In the sentencing phase, the jury found, *inter alia*, the aggravating factor that the murder was committed while House was committing, attempting to commit, or fleeing from the commission of rape or kidnaping. In affirming, the State Supreme Court described the evidence as circumstantial but strong. House was denied state postconviction relief. Subsequently, the Federal District Court denied habeas relief, deeming House's claims procedurally defaulted and granting the State summary judgment on most of his claims. It also found, after an evidentiary hearing at which House attacked the blood and semen evidence and presented other evidence, including a putative confession, suggesting that Mr. Muncey committed the crime, that House did not fall within the "actual innocence" exception to procedural default recognized in *Schlup* v. *Delo*, 513 U. S. 298, and *Sawyer* v. *Whitley*, 505 U. S. 333. The Sixth Circuit ultimately affirmed.

Held:

1. Because House has made the stringent showing required by the actual-innocence exception, his federal habeas action may proceed. Pp. 16–34.

(a) To implement the general principle that "comity and finality 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *Murray* v. *Carrier*, 477 U. S. 478, 495, this Court has ruled that prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, "it is more likely

than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U. S. at 327. Several features of *Schlup*'s standard bear emphasis here. First, while the gateway claim requires "new reliable evidence . . . not presented at trial," *id.*, at 324, the habeas court must assess the likely impact of "'all the evidence'" on reasonable jurors. *id.*, at 329. Second, rather than requiring absolute certainty about guilt or innocence, a petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt. Finally, this standard is "by no means equivalent to the standard of *Jackson* v. *Virginia*, 443 U. S. 307," which governs insufficient evidence claims, *id.*, at 330. Rather, because a *Schlup* claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record. See *ibid.* Contrary to the State's arguments, the standard of review in two provisions of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U. S. C. §§2244(b)(2)(B)(ii) and 2254(e)(2), is inapplicable here. In addition, because the standard does not address a "district court's independent judgment as to whether reasonable doubt exists," *Schlup, supra*, at 329, a ruling in House's favor does not require the showing of clear error as to the District Court's specific findings. It is with these principles in mind that the evidence developed in House's federal habeas proceedings should be evaluated. Pp. 16–20.

(b) In direct contradiction of evidence presented at trial, DNA testing has established that semen on Mrs. Muncey's clothing came from her husband, not House. While the State claims that the evidence is immaterial since neither sexual contact nor motive were elements of the offense at the guilt phase, this Court considers the new disclosure of central importance. This case is about who committed the crime, so motive is key, and the prosecution at the guilt phase referred to evidence at the scene suggesting that House committed, or attempted to commit, an indignity on Mrs. Muncey. Apart from proving motive, this was the only forensic evidence at the scene that would link House to the murder. Law and society demand accountability for a sexual offense, so the evidence was also likely a factor in persuading the jury not to let him go free. At sentencing, moreover, the jury concluded that the murder was committed in the course of a rape or kidnaping. A jury acting without the assumption that the semen could have come from House would have found it necessary to establish some different motive, or, if the same motive, an intent far more speculative. Pp. 20–22.

(c) The evidentiary disarray surrounding the other forensic evi-

dence, the bloodstains on House's pants, taken together with the testimony of an Assistant Chief Medical Examiner for the State of Tennessee, would prevent reasonable jurors from placing significant reliance on the blood evidence. The medical examiner who testified believes the blood on the jeans must have come from the autopsy samples. In addition, a vial and a quarter of autopsy blood is unaccounted for; the blood was transported to the FBI together with the pants in conditions that could have caused the vials to spill; some blood did spill at least once during the blood's journey from Tennessee authorities through FBI hands to a defense expert; the pants were stored in a plastic bag bearing a large bloodstain and a label from a Tennessee Bureau of Investigation agent; and the box containing the blood samples may have been opened before arriving at the FBI lab. None of this evidence was presented to the trial jury. Whereas the bloodstains seemed strong evidence of House's guilt at trial, the record now raises substantial questions about the blood's origin. Pp. 22–28.

(d) In the post-trial proceedings, House presented troubling evidence that Mr. Muncey could have been the murderer. Two witnesses described a confession by Mr. Muncey; two others described suspicious behavior (a fight between the couple and Mr. Muncey's attempt to construct a false alibi) around the time of the crime; and others described a history of spousal abuse. Considered in isolation, a reasonable jury might well disregard this evidence, but in combination with the challenges to the blood evidence and lack of motive with respect to House, evidence pointing to Mr. Muncey likely would reinforce other doubts as to House's guilt. Pp. 28–33.

(e) The Assistant Chief Medical Examiner further testified that certain injuries discovered on House after the crime likely did not result from involvement in the murder. Certain other evidence—Mrs. Muncey's daughter's recollection of the night of the murder, and the District Court's finding at the habeas proceeding that House was not a credible witness—may favor the State. Pp. 33–34.

(f) While this is not a case of conclusive exoneration, and the issue is close, this is the rare case where—had the jury heard all the conflicting testimony—it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt. P. 34.

2. House has not shown freestanding innocence that would render his imprisonment and planned execution unconstitutional under *Herrera* v. *Collins*, 506 U. S. 390, in which the Court assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there

Syllabus

were no state avenue open to process such a claim," *id.*, at 417. The threshold showing for such a right would be extraordinarily high, and House has not satisfied whatever burden a hypothetical freestanding innocence claim would require. He has cast doubt on his guilt sufficient to satisfy *Schlup*'s gateway standard for obtaining federal review, but given the closeness of the *Schlup* question here, his showing falls short of the threshold implied in *Herrera*. Pp. 34–36.

386 F. 3d 668, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. ROBERTS, C. J., filed an opinion concurring in the judgment in part and dissenting in part, in which SCALIA and THOMAS, JJ., joined. ALITO, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–8990

PAUL GREGORY HOUSE, PETITIONER *v.* RICKY BELL, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 12, 2006]

JUSTICE KENNEDY delivered the opinion of the Court.

Some 20 years ago in rural Tennessee, Carolyn Muncey was murdered. A jury convicted petitioner Paul Gregory House of the crime and sentenced him to death, but new revelations cast doubt on the jury's verdict. House, protesting his innocence, seeks access to federal court to pursue habeas corpus relief based on constitutional claims that are procedurally barred under state law. Out of respect for the finality of state-court judgments federal habeas courts, as a general rule, are closed to claims that state courts would consider defaulted. In certain exceptional cases involving a compelling claim of actual innocence, however, the state procedural default rule is not a bar to a federal habeas corpus petition. See *Schlup* v. *Delo*, 513 U. S. 298, 319–322 (1995). After careful review of the full record, we conclude that House has made the stringent showing required by this exception; and we hold that his federal habeas action may proceed.

I

We begin with the facts surrounding Mrs. Muncey's disappearance, the discovery of her body, and House's

arrest. Around 3 p.m. on Sunday, July 14, 1985, two local residents found her body concealed amid brush and tree branches on an embankment roughly 100 yards up the road from her driveway. Mrs. Muncey had been seen last on the evening before, when, around 8 p.m., she and her two children—Lora Muncey, age 10, and Matthew Muncey, age 8—visited their neighbor, Pam Luttrell. According to Luttrell, Mrs. Muncey mentioned her husband, William Hubert Muncey, Jr., known in the community as "Little Hube" and to his family as "Bubbie." As Luttrell recounted Mrs. Muncey's comment, Mr. Muncey "had gone to dig a grave, and he hadn't come back, but that was all right, because [Mrs. Muncey] was going to make him take her fishing the next day," App. 11–12. Mrs. Muncey returned home, and some time later, before 11:00 p.m. at the latest, Luttrell "heard a car rev its motor as it went down the road," something Mr. Muncey customarily did when he drove by on his way home. Record, Addendum 4, 5 Tr. of Evidence in No. 378 (Crim. Ct. Union County, Tenn.) 641–642 (hereinafter Tr.). Luttrell then went to bed.

Around 1 a.m., Lora and Matthew returned to Luttrell's home, this time with their father, Mr. Muncey, who said his wife was missing. Muncey asked Luttrell to watch the children while he searched for his wife. After he left, Luttrell talked with Lora. According to Luttrell:

> "[Lora] said she heard a horn blow, she thought she heard a horn blow, and somebody asked if Bubbie was home, and her mama, you know, told them—no. And then she said she didn't know if she went back to sleep or not, but then she heard her mama going down the steps crying and I am not sure if that is when she told me that she heard her mama say—oh God, no, not me, or if she told me that the next day, but I do know that she said she heard her mother going down

the steps crying." App. 14–15.

While Lora was talking, Luttrell recalled, "Matt kept butting in, you know, on us talking, and he said—sister they said daddy had a wreck, they said daddy had a wreck." *Id.*, at 13.

At House's trial, Lora repeated her account of the night's events, this time referring to the "wreck" her brother had mentioned. To assist in understanding Lora's account, it should be noted that Mrs. Muncey's father-in-law—Little Hube's father—was sometimes called "Big Hube." Lora and her brother called him "Paw Paw." We refer to him as Mr. Muncey, Sr. According to Lora, Mr. Muncey, Sr. had a deep voice, as does petitioner House.

Lora testified that after leaving Luttrell's house with her mother, she and her brother "went to bed." *Id.*, at 18. Later, she heard someone, or perhaps two different people, ask for her mother. Lora's account of the events after she went to bed was as follows:

> "Q Laura *[sic]*, at some point after you got back home and you went to bed, did anything happen that caused your mother to be upset or did you hear anything?
> "A Well, it sounded like PawPaw said—where's daddy at, and she said digging a grave.
> "Q Okay. Do you know if it was PawPaw or not, or did it sound like PawPaw?
> "A It just sounded like PawPaw.
> "Q And your mother told him what?
> "A That he was digging a grave.
> "Q Had you ever heard that voice before that said that?
> "A I don't remember.
> "Q After that, at some point later, did you hear anything else that caused your mother to be upset?
> "A Well, they said that daddy had a wreck down the road and she started crying—next to the creek.

"Q Your mother started crying. What was it that they said?
"A That daddy had a wreck.
"Q Did they say where?
"A Down there next to the creek." *Id.*, at 18–19.

Lora did not describe hearing any struggle. Some time later, Lora and her brother left the house to look for their mother, but no one answered when they knocked at the Luttrells' home, and another neighbor, Mike Clinton, said he had not seen her. After the children returned home, according to Lora, her father came home and "fixed him a bologna sandwich and he took a bit of it and he says—sissy, where is mommy at, and I said—she ain't been here for a little while." *Id.*, at 20. Lora recalled that Mr. Muncey went outside and, not seeing his wife, returned to take Lora and Matthew to the Luttrells' so that he could look further.

The next afternoon Billy Ray Hensley, the victim's first cousin, heard of Mrs. Muncey's disappearance and went to look for Mr. Muncey. As he approached the Munceys' street, Hensley allegedly "saw Mr. House come out from under a bank, wiping his hands on a black rag." *Id.*, at 32. Just when and where Hensley saw House, and how well he could have observed him, were disputed at House's trial. Hensley admitted on cross-examination that he could not have seen House "walking up or climbing up" the embankment, *id.*, at 39; rather, he saw House, in "[j]ust a glance," *id.*, at 40, "appear out of nowhere," "next to the embankment," *id.*, at 39. On the Munceys' street, opposite the area where Hensley said he saw House, a white Plymouth was parked near a sawmill. Another witness, Billy Hankins, whom the defense called, claimed that around the same time he saw a "boy" walking down the street away from the parked Plymouth and toward the Munceys' home. This witness, however, put the "boy" on the side of

the street with the parked car and the Munceys' driveway, not the side with the embankment.

Hensley, after turning onto the Munceys' street, continued down the road and turned into their driveway. "I pulled up in the driveway where I could see up toward Little Hube's house," Hensley testified, "and I seen Little Hube's car wasn't there, and I backed out in the road, and come back [the other way]." *Id.*, at 32. As he traveled up the road, Hensley saw House traveling in the opposite direction in the white Plymouth. House "flagged [Hensley] down" through his windshield, *ibid.*, and the two cars met about 300 feet up the road from the Munceys' driveway. According to Hensley, House said he had heard Mrs. Muncey was missing and was looking for her husband. *Id.*, at 33. Though House had only recently moved to the area, he was acquainted with the Munceys, had attended a dance with them, and had visited their home. He later told law enforcement officials he considered both of the Munceys his friends. According to Hensley, House said he had heard that Mrs. Muncey's husband, who was an alcoholic, was elsewhere "getting drunk." *Ibid.*

As Hensley drove off, he "got to thinking to [him]self—he's hunting Little Hube, and Little Hube drunk—what would he be doing off that bank . . . ." *Ibid.* His suspicion aroused, Hensley later returned to the Munceys' street with a friend named Jack Adkins. The two checked different spots on the embankment, and though Hensley saw nothing where he looked, Adkins found Mrs. Muncey. Her body lay across from the sawmill near the corner where House's car had been parked, dumped in the woods a short way down the bank leading toward a creek.

Around midnight, Dr. Alex Carabia, a practicing pathologist and county medical examiner, performed an autopsy. Dr. Carabia put the time of death between 9 and 11 p.m. Mrs. Muncey had a black eye, both her hands were bloodstained up to the wrists, and she had bruises on

her legs and neck. Dr. Carabia described the bruises as consistent with a "traumatic origin," *i.e.*, a fight or a fall on hard objects. 7 *id.*, at 985–986. Based on the neck bruises and other injuries, he concluded Mrs. Muncey had been choked, but he ruled this out as the cause of death. The cause of death, in Dr. Carabia's view, was a severe blow to the left forehead that inflicted both a laceration penetrating to the bone and, inside the skull, a severe right-side hemorrhage, likely caused by Mrs. Muncey's brain slamming into the skull opposite the impact. Dr. Carabia described this head injury as consistent either with receiving a blow from a fist or other instrument or with striking some object.

The county sheriff, informed about Hensley's earlier encounter with House, questioned House shortly after the body was found. That evening, House answered further questions during a voluntary interview at the local jail. Special Agent Ray Presnell of the Tennessee Bureau of Investigation (TBI) prepared a statement of House's answers, which House signed. Asked to describe his whereabouts on the previous evening, House claimed—falsely, as it turned out—that he spent the entire evening with his girlfriend, Donna Turner, at her trailer. Asked whether he was wearing the same pants he had worn the night before, House replied—again, falsely—that he was. House was on probation at the time, having recently been released on parole following a sentence of five years to life for aggravated sexual assault in Utah. House had scratches on his arms and hands, and a knuckle on his right ring finger was bruised. He attributed the scratches to Turner's cats and the finger injury to recent construction work tearing down a shed. The next day House gave a similar statement to a different TBI agent, Charles Scott.

In fact House had not been at Turner's home. After initially supporting House's alibi, Turner informed au-

thorities that House left her trailer around 10:30 or 10:45 p.m. to go for a walk. According to Turner's trial testimony, House returned later—she was not sure when—hot and panting, missing his shirt and his shoes. House, Turner testified, told her that while he was walking on the road near her home, a vehicle pulled up beside him, and somebody inside "called him some names and then they told him he didn't belong here anymore." App. 89. House said he tried to ignore the taunts and keep walking, but the vehicle pulled in behind him, and "one of them got out and grabbed him by the shoulder . . . and [House] swung around with his right hand" and "hit something." *Ibid.* According to Turner, House said "he took off down the bank and started running and he said that he—he said it seemed forever where he was running. And he said they fired two shots at him while he took off down the bank . . . ." *Ibid.* House claimed the assailants "grabbed ahold of his shirt," which Turner remembered as "a blue tank top, trimmed in yellow," and "they tore it to where it wouldn't stay on him and he said—I just throwed it off when I was running." *Id.*, at 91. Turner, noticing House's bruised knuckle, asked how he hurt it, and House told her "that's where he hit." *Id.*, at 90. Turner testified that she "thought maybe my ex-husband had something to do with it." *Ibid.*

Although the white Plymouth House drove the next day belonged to Turner, Turner insisted House had not used the car that night. No forensic evidence connected the car to the crime; law enforcement officials inspected a white towel covering the driver seat and concluded it was clean. Turner's trailer was located just under two miles by road, through hilly terrain, from the Muncey residence.

Law enforcement officers also questioned the victim's husband. Though Mrs. Muncey's comments to Luttrell gave no indication she knew this, Mr. Muncey had spent the evening at a weekly dance at a recreation center

roughly a mile and a half from his home. In his statement to law enforcement—a statement House's trial counsel claims he never saw—Mr. Muncey admitted leaving the dance early, but said it was only for a brief trip to the package store to buy beer. He also stated that he and his wife had had sexual relations Saturday morning.

Late in the evening on Monday, July 15—two days after the murder—law enforcement officers visited Turner's trailer. With Turner's consent, Agent Scott seized the pants House was wearing the night Mrs. Muncey disappeared. The heavily soiled pants were sitting in a laundry hamper; years later, Agent Scott recalled noticing "reddish brown stains" he "suspected" were blood. *Id.*, at 274–275. Around 4 p.m. the next day, two local law enforcement officers set out for the Federal Bureau of Investigation in Washington, D. C., with House's pants, blood samples from the autopsy, and other evidence packed together in a box. They arrived at 2:00 a.m. the next morning. On July 17, after initial FBI testing revealed human blood on the pants, House was arrested.

II

The State of Tennessee charged House with capital murder. At House's trial, the State presented testimony by Luttrell, Hensley, Adkins, Lora Muncey, Dr. Carabia, the sheriff, and other law enforcement officials. Through TBI Agents Presnell and Scott, the jury learned of House's false statements. Central to the State's case, however, was what the FBI testing showed—that semen consistent (or so it seemed) with House's was present on Mrs. Muncey's nightgown and panties, and that small bloodstains consistent with Mrs. Muncey's blood but not House's appeared on the jeans belonging to House.

Regarding the semen, FBI Special Agent Paul Bigbee, a serologist, testified that the source was a "secretor," meaning someone who "secrete[s] the ABO blood group sub-

stances in other body fluids, such as semen and saliva"—a characteristic shared by 80 percent of the population, including House. *Id.*, at 55. Agent Bigbee further testified that the source of semen on the gown was blood-type A, House's own blood type. As to the semen on the panties, Agent Bigbee found only the H blood-group substance, which A and B blood-type secretors secrete along with substances A and B, and which O-type secretors secrete exclusively. Agent Bigbee explained, however—using science an *amicus* here sharply disputes, see Brief for Innocence Project, Inc., as *Amicus Curiae* 24–26—that House's A antigens could have "degraded" into H, App. 57–58. Agent Bigbee thus concluded that both semen deposits could have come from House, though he acknowledged that that the H antigen could have come from Mrs. Muncey herself if she was a secretor—something he "was not able to determine," *id.*, at 58—and that, while Mr. Muncey was himself blood-type A (as was his wife), Agent Bigbee was again "not able to determine his secretor status," *id.*, at 57. Agent Bigbee acknowledged on cross-examination that "a saliva sample" would have sufficed to determine whether Mr. Muncey was a secretor; the State did not provide such a sample, though it did provide samples of Mr. Muncey's blood. *Id.*, at 62.

As for the blood, Agent Bigbee explained that "spots of blood" appeared "on the left outside leg, the right bottom cuff, on the left thigh and in the right inside pocket and on the lower pocket on the outside." *Id.*, at 48. Agent Bigbee determined that the blood's source was type A (the type shared by House, the victim, and Mr. Muncey). He also successfully tested for the enzyme phosphoglucomutase and the blood serum haptoglobin, both of which "are found in all humans" and carry "slight chemical differences" that vary genetically and "can be grouped to differentiate between two individuals if those types are different." *Id.*, at 49–50. Based on these chemical traces and on the A

blood type, Agent Bigbee determined that only some 6.75 percent of the population carry similar blood, that the blood was "consistent" with Mrs. Muncey's (as determined by testing autopsy samples), and that it was "impossible" that the blood came from House. *Id.*, at 48–52.

A different FBI expert, Special Agent Chester Blythe, testified about fiber analysis performed on Mrs. Muncey's clothes and on House's pants. Although Agent Blythe found blue jean fibers on Mrs. Muncey's nightgown, brassier, housecoat, and panties, and in fingernail scrapings taken from her body (scrapings that also contained trace, unidentifiable amounts of blood), he acknowledged that, as the prosecutor put it in questioning the witness, "blue jean material is common material," so "this doesn't mean that the fibers that were all over the victim's clothing were necessarily from [House's] pair of blue jeans." 6 Tr. 864–865. On House's pants, though cotton garments both transfer and retain fibers readily, Agent Blythe found neither hair nor fiber consistent with the victim's hair or clothing.

In the defense case House called Hankins, Clinton, and Turner, as well as House's mother, who testified that House had talked to her by telephone around 9:30 p.m. on the night of the murder and that he had not used her car that evening. House also called the victim's brother, Ricky Green, as a witness. Green testified that on July 2, roughly two weeks before the murder, Mrs. Muncey called him and "said her and Little Hube had been into it and she said she was wanting to leave Little Hube, she said she was wanting to get out—out of it, and she was scared." 7 *id.*, at 1088. Green recalled that at Christmastime in 1982 he had seen Mr. Muncey strike Mrs. Muncey after returning home drunk.

As Turner informed the jury, House's shoes were found several months after the crime in a field near her home. Turner delivered them to authorities. Though the jury did not learn of this fact (and House's counsel claims he did

not either), the State tested the shoes for blood and found none. House's shirt was not found.

The State's closing argument suggested that on the night of her murder, Mrs. Muncey "was deceived . . . . She had been told [her husband] had had an accident." 9 *id.*, at 1226. The prosecutor emphasized the FBI's blood analysis, noting that "after running many, many, many tests," Agent Bigbee:

> "was able to tell you that the blood on the defendant's blue jeans was not his own blood, could not be his own blood. He told you that the blood on the blue jeans was consistent with every characteristic in every respect of the deceased's, Carolyn Muncey's, and that ninety-three (93%) percent of the white population would not have that blood type. . . . He can't tell you one hundred (100%) percent for certain that it was her blood. But folks, he can sure give you a pretty good—a pretty good indication." *Id.*, at 1235–1236.

In the State's rebuttal, after defense counsel questioned House's motive "to go over and kill a woman that he barely knew[,] [w]ho was still dressed, still clad in her clothes," *Id.*, at 1274, the prosecutor referred obliquely to the semen stains. While explaining that legally "it does not make any difference under God's heaven, what the motive was," App. 106, the prosecutor told the jury, "you may have an idea why he did it," *ibid.*:

> "The evidence at the scene which seemed to suggest that he was subjecting this lady to some kind of indignity, why would you get a lady out of her house, late at night, in her night clothes, under the trick that her husband has had a wreck down by the creek? . . . Well, it is because either you don't want her to tell what indignities you have subjected her to, or she is unwilling and fights against you, against being subjected to those indignities. In other words, it is either

> to keep her from telling what you have done to her, or it is that you are trying to get her to do something that she nor any mother on that road would want to do with Mr. House, under those conditions, and you kill her because of her resistance. That is what the evidence at the scene suggests about motive." *Id.*, at 106–107.

In addition the government suggested the black rag Hensley said he saw in House's hands was in fact the missing blue tank top, retrieved by House from the crime scene. And the prosecution reiterated the importance of the blood. "[D]efense counsel," he said, "does not start out discussing the fact that his client had blood on his jeans on the night that Carolyn Muncey was killed. . . . He doesn't start with the fact that nothing that the defense has introduced in this case explains what blood is doing on his jeans, all over his jeans, that is scientifically, completely different from his blood." *Id.*, at 104–105. The jury found House guilty of murder in the first degree.

The trial advanced to the sentencing phase. As aggravating factors to support a capital sentence, the State sought to prove: (1) that House had previously been convicted of a felony involving the use or threat of violence; (2) that the homicide was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (3) that the murder was committed while House was committing, attempting to commit, or fleeing from the commission of, rape or kidnaping. See Tenn. Code Ann. §§39–2–203(i)(2), (5), (7) (1982) (repealed 1989); compare §§39–13–204(i)(2), (5), (7) (2003). After presenting evidence of House's parole status and aggravated sexual assault conviction, the State rested. As mitigation, the defense offered testimony from House's father and mother, as well as evidence, presented through House's mother, that House attempted suicide after the guilt-phase verdict.

Before the attempt House wrote his mother a letter professing his innocence.

In closing the State urged the jury to find all three aggravating factors and impose death. As to the kidnaping or rape factor, the prosecution suggested Mrs. Muncey was "decoy[ed] or entic[ed] . . . away from her family, and confin[ed] her against her will because you know that as she was being beaten to death." 10 Tr. 1410. "We also think," the prosecutor added, "the proof shows strong evidence of attempted sexual molestation of the victim to accompany the taking away and murdering her." *Id.*, at 1410–1411. Later the prosecutor argued, "I think the proof shows in the record that it is more likely than not that having been through the process before and having been convicted of a crime involving the threat of violence, or violence to another person, aggravated sexual assault, that the defendant cannot benefit from the type of rehabilitation that correction departments can provide." *Id.*, at 1413. The jury unanimously found all three aggravating factors and concluded "there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances." *Id.*, at1454. The jury recommended a death sentence, which the trial judge imposed.

III

The Tennessee Supreme Court affirmed House's conviction and sentence, describing the evidence against House as "circumstantial" but "quite strong." *State* v. *House*, 743 S. W. 2d 141, 143, 144 (1987). Two months later, in a state trial court, House filed a *pro se* petition for postconviction relief, arguing he received ineffective assistance of counsel at trial. The court appointed counsel, who amended the petition to raise other issues, including a challenge to certain jury instructions. At a hearing before the same judge who conducted the trial, House's counsel offered no

proof beyond the trial transcript. The trial court dismissed the petition, deeming House's trial counsel adequate and overruling House's other objections. On appeal House's attorney renewed only the jury-instructions argument. In an unpublished opinion the Tennessee Court of Criminal Appeals affirmed, and both the Tennessee Supreme Court and this Court, *House* v. *Tennessee*, 498 U. S. 912 (1990), denied review.

House filed a second postconviction petition in state court reasserting his ineffective-assistance claim and seeking investigative and/or expert assistance. After extensive litigation regarding whether House's claims were procedurally defaulted the Tennessee Supreme Court held that House's claims were barred under a state statute providing that claims not raised in prior postconviction proceedings are presumptively waived, Tenn. Code Ann. §40–30–112 (1990) (repealed 1995), and that courts may not consider grounds for relief "which the court finds should be excluded because they have been waived or previously determined," §40–30–111 (repealed 1995). See *House* v. *State*, 911 S. W. 2d 705 (Tenn. 1995). This Court denied certiorari. *House* v. *Tennessee*, 517 U. S. 1193 (1996).

House next sought federal habeas relief, asserting numerous claims of ineffective assistance of counsel and prosecutorial misconduct. The United States District Court for the Eastern District of Tennessee, though deeming House's claims procedurally defaulted and granting summary judgment to the State on the majority of House's claims, held an evidentiary hearing to determine whether House fell within the "actual innocence" exception to procedural default that this Court recognized as to substantive offenses in *Schlup* and as to death sentences in *Sawyer* v. *Whitley*, 505 U. S. 333 (1992). Presenting evidence we describe in greater detail below, House attacked the semen and blood evidence used at his trial and presented other evidence, including a putative confession,

suggesting that Mr. Muncey, not House, committed the murder. The District Court nevertheless denied relief, holding that House had neither demonstrated actual innocence of the murder under *Schlup* nor established that he was ineligible for the death penalty under *Sawyer*.

The Court of Appeals for the Sixth Circuit granted a certificate of appealability under 28 U. S. C. §2253(c) as to all claims in the habeas petition. On the merits a divided panel affirmed, but its opinion was withdrawn and the case taken en banc. A divided en banc court certified state-law questions to the Tennessee Supreme Court. *House* v. *Bell*, 311 F. 3d 767 (CA6 2002). Concluding that House had made a compelling showing of actual innocence, and recognizing that in *Herrera* v. *Collins*, 506 U. S. 390 (1993), this Court assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim," *id.*, at 417, the six-judge majority certified questions to the State Supreme Court, 311 F. 3d, at 777–778. The questions sought "to ascertain whether there remains a 'state avenue open to process such a claim' in this case." *Id.*, at 768. Four dissenting judges argued the court should have reached the merits, rather than certifying questions to the state court; these judges asserted that House could not obtain relief under *Schlup*, let alone *Sawyer* and *Herrera*. 311 F. 3d, at 780–781 (Boggs, J., dissenting). A fifth dissenter explained that while he agreed with the majority that House "presents a strong claim for habeas relief, at least at the sentencing phase of the case," he objected to the certification of questions to the Tennessee high court. *Id.*, at 787 (opinion of Gilman, J.). This Court denied certiorari. *Bell* v. *House*, 539 U. S. 937 (2003).

The State urged the Tennessee Supreme Court not to

answer the Court of Appeals' certified questions, and the state court did not do so. The case returned to the United States Court of Appeals for the Sixth Circuit. This time an eight-judge majority affirmed the District Court's denial of habeas relief. 386 F. 3d 668 (2004). Six dissenters argued that House not only had met the actual innocence standard for overcoming procedural default but also was entitled to immediate release under *Herrera*. 386 F. 3d, at 708 (Merritt, J., dissenting). A seventh dissenter (the same judge who wrote separately in the previous en banc decision) described the case as "a real-life murder mystery, an authentic 'who-done-it' where the wrong man may be executed." *Id.*, at 709 (opinion of Gilman, J.). He concluded such grave uncertainty necessitated relief in the form of a new trial for House. *Id.*, at 710.

We granted certiorari, 545 U. S. ___ (2005), and now reverse.

IV

As a general rule, claims forfeited under state law may support federal habeas relief only if the prisoner demonstrates cause for the default and prejudice from the asserted error. See *Murray* v. *Carrier*, 477 U. S. 478, 485 (1986); *Engle* v. *Isaac*, 456 U. S. 107, 129 (1982); *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977). The rule is based on the comity and respect that must be accorded to state-court judgments. See, *e.g.*, *Engle*, *supra*, at 126–129; *Wainwright*, *supra*, at 89–90. The bar is not, however, unqualified. In an effort to "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case," *Schlup*, 513 U. S., at 324, the Court has recognized a miscarriage-of-justice exception. "'[I]n appropriate cases,'" the Court has said, "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of cor-

recting a fundamentally unjust incarceration,'" *Carrier*, *supra*, at 495 (quoting *Engle*, *supra*, at 135).

In *Schlup*, the Court adopted a specific rule to implement this general principle. It held that prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." 513 U. S., at 327. This formulation, *Schlup* explains, "ensures that petitioner's case is truly 'extraordinary,' while still providing petitioner a meaningful avenue by which to avoid a manifest injustice." *Ibid.* (quoting *McCleskey* v. *Zant*, 499 U. S. 467, 494 (1991)). In the usual case the presumed guilt of a prisoner convicted in state court counsels against federal review of defaulted claims. Yet a petition supported by a convincing *Schlup* gateway showing "raise[s] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error"; hence, "a review of the merits of the constitutional claims" is justified. 513 U. S., at 317.

For purposes of this case several features of the *Schlup* standard bear emphasis. First, although "[t]o be credible" a gateway claim requires "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial," *id.*, at 324, the habeas court's analysis is not limited to such evidence. There is no dispute in this case that House has presented some new reliable evidence; the State has conceded as much, see *infra*, at 20–21. In addition, because the District Court held an evidentiary hearing in this case, and because the State does not challenge the court's decision to do so, we have no occasion to elaborate on *Schlup*'s observation that when considering an actual-innocence claim in the context of a request for an evidentiary hearing, the District Court need not "test

the new evidence by a standard appropriate for deciding a motion for summary judgment," but rather may "consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence." 513 U. S., at 331–332. Our review in this case addresses the merits of the *Schlup* inquiry, based on a fully developed record, and with respect to that inquiry *Schlup* makes plain that the habeas court must consider "'all the evidence,'" old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under "rules of admissibility that would govern at trial." See *id.*, at 327–328 (quoting Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970)). Based on this total record, the court must make "a probabilistic determination about what reasonable, properly instructed jurors would do." 513 U. S., at 329. The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors. *Ibid.*

Second, it bears repeating that the *Schlup* standard is demanding and permits review only in the "'extraordinary'" case. *Id.*, at 327 (quoting *Zant, supra*, at 494); see also 513 U. S., at 324 (emphasizing that "in the vast majority of cases, claims of actual innocence are rarely successful"). At the same time, though, the *Schlup* standard does not require absolute certainty about the petitioner's guilt or innocence. A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt.

Finally, as the *Schlup* decision explains, the gateway actual-innocence standard is "by no means equivalent to the standard of *Jackson* v. *Virginia*, 443 U. S. 307 (1979)."

which governs claims of insufficient evidence. *Id.*, at 330. When confronted with a challenge based on trial evidence, courts presume the jury resolved evidentiary disputes reasonably so long as sufficient evidence supports the verdict. Because a *Schlup* claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record. See *ibid.* If new evidence so requires, this may include consideration of "the credibility of the witnesses presented at trial." *Ibid.*; see also *ibid.* (noting that "[i]n such a case, the habeas court may have to make some credibility assessments").

As an initial matter, the State argues that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, has replaced the *Schlup* standard with a stricter test based on *Sawyer*, which permits consideration of successive, abusive or defaulted sentencing-related claims only if the petitioner "show[s] by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law," 505 U. S., at 336. One AEDPA provision establishes a similar standard for second or successive petitions involving no retroactively applicable new law, 28 U. S. C. §2244(b)(2)(B)(ii); another sets it as a threshold for obtaining an evidentiary hearing on claims the petitioner failed to develop in state court, §2254(e)(2). Neither provision addresses the type of petition at issue here—a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence. Thus, the standard of review in these provisions is inapplicable. Cf. *Lonchar* v. *Thomas*, 517 U. S. 314, 324 (1996) ("[D]ismissal of a *first* federal habeas petition is a particularly serious matter").

The State also argues that the District Court's findings in this case tie our hands, precluding a ruling in House's

favor absent a showing of clear error as to the District Court's specific determinations. This view overstates the effect of the District Court's ruling. Deference is given to a trial court's assessment of evidence presented to it in the first instance. Yet the *Schlup* inquiry, we repeat, requires a holistic judgment about "'all the evidence,'" 513 U. S., at 328 (quoting Friendly, *supra*, at 160), and its likely effect on reasonable jurors applying the reasonable-doubt standard. As a general rule, the inquiry does not turn on discrete findings regarding disputed points of fact, and "[i]t is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses," 513 U. S., at 329. Here, although the District Court attentively managed complex proceedings, carefully reviewed the extensive record, and drew certain conclusions about the evidence, the court did not clearly apply *Schlup*'s predictive standard regarding whether reasonable jurors would have reasonable doubt. As we shall explain, moreover, we are uncertain about the basis for some of the District Court's conclusions—a consideration that weakens our reliance on its determinations.

With this background in mind we turn to the evidence developed in House's federal habeas proceedings.

DNA Evidence

First, in direct contradiction of evidence presented at trial, DNA testing has established that the semen on Mrs. Muncey's nightgown and panties came from her husband, Mr. Muncey, not from House. The State, though conceding this point, insists this new evidence is immaterial. At the guilt phase at least, neither sexual contact nor motive were elements of the offense, so in the State's view the evidence, or lack of evidence, of sexual assault or sexual advance is of no consequence. We disagree. In fact we consider the new disclosure of central importance.

From beginning to end the case is about who committed

the crime. When identity is in question, motive is key. The point, indeed, was not lost on the prosecution, for it introduced the evidence and relied on it in the final guilt-phase closing argument. Referring to "evidence at the scene," the prosecutor suggested that House committed, or attempted to commit, some "indignity" on Mrs. Muncey that neither she "nor any mother on that road would want to do with Mr. House." 9 Tr. 1302–1303. Particularly in a case like this where the proof was, as the State Supreme Court observed, circumstantial, *State* v. *House*, 743 S. W. 2d, at 143, 144, we think a jury would have given this evidence great weight. Quite apart from providing proof of motive, it was the only forensic evidence at the scene that would link House to the murder.

Law and society, as they ought to do, demand accountability when a sexual offense has been committed, so not only did this evidence link House to the crime; it likely was a factor in persuading the jury not to let him go free. At sentencing, moreover, the jury came to the unanimous conclusion, beyond a reasonable doubt, that the murder was committed in the course of a rape or kidnaping. The alleged sexual motivation relates to both those determinations. This is particularly so given that, at the sentencing phase, the jury was advised that House had a previous conviction for sexual assault.

A jury informed that fluids on Mrs. Muncey's garments could have come from House might have found that House trekked the nearly two miles to the victim's home and lured her away in order to commit a sexual offense. By contrast a jury acting without the assumption that the semen could have come from House would have found it necessary to establish some different motive, or, if the same motive, an intent far more speculative. When the only direct evidence of sexual assault drops out of the case, so, too, does a central theme in the State's narrative linking House to the crime. In that light, furthermore,

House's odd evening walk and his false statements to authorities, while still potentially incriminating, might appear less suspicious.

Bloodstains

The other relevant forensic evidence is the blood on House's pants, which appears in small, even minute, stains in scattered places. As the prosecutor told the jury, they were stains that, due to their small size, "you or I might not detect[,] [m]ight not see, but which the FBI lab was able to find on [House's] jeans." App. 11. The stains appear inside the right pocket, outside that pocket, near the inside button, on the left thigh and outside leg, on the seat of the pants, and on the right bottom cuff, including inside the pants. Due to testing by the FBI, cuttings now appear on the pants in several places where stains evidently were found. (The cuttings were destroyed in the testing process, and defense experts were unable to replicate the tests.) At trial, the government argued "nothing that the defense has introduced in this case explains what blood is doing on his jeans, all over [House's] jeans, that is scientifically, completely different from his blood." *Id.*, at 105. House, though not disputing at this point that the blood is Mrs. Muncey's, now presents an alternative explanation that, if credited, would undermine the probative value of the blood evidence.

During House's habeas proceedings, Dr. Cleland Blake, an Assistant Chief Medical Examiner for the State of Tennessee and a consultant in forensic pathology to the TBI for 22 years, testified that the blood on House's pants was chemically too degraded, and too similar to blood collected during the autopsy, to have come from Mrs. Muncey's body on the night of the crime. The blood samples collected during the autopsy were placed in test tubes without preservative. Under such conditions, according to Dr. Blake, "you will have enzyme degradation. You will

have different blood group degradation, blood marker degradation." Record, Doc. 275, p. 80 (hereinafter R275:80). The problem of decay, moreover, would have been compounded by the body's long exposure to the elements, sitting outside for the better part of a summer day. In contrast, if blood is preserved on cloth, "it will stay there for years," *ibid.*; indeed, Dr. Blake said he deliberately places blood drops on gauze during autopsies to preserve it for later testing. The blood on House's pants, judging by Agent Bigbee's tests, showed "similar deterioration, breakdown of certain of the named numbered enzymes" as in the autopsy samples. *Id.*, at 110. "[I]f the victim's blood had spilled on the jeans while the victim was alive and this blood had dried," Dr. Blake stated, "the deterioration would not have occurred," *ibid.*, and "you would expect [the blood on the jeans] to be different than what was in the tube," *id.*, at 113. Dr. Blake thus concluded the blood on the jeans came from the autopsy samples, not from Mrs. Muncey's live (or recently killed) body.

Other evidence confirms that blood did in fact spill from the vials. It appears the vials passed from Dr. Carabia, who performed the autopsy, into the hands of two local law enforcement officers, who transported it to the FBI, where Agent Bigbee performed the enzyme tests. The blood was contained in four vials, evidently with neither preservative nor a proper seal. The vials, in turn, were stored in a styrofoam box, but nothing indicates the box was kept cool. Rather, in what an evidence protocol expert at the habeas hearing described as a violation of proper procedure, the styrofoam box was packed in the same cardboard box as other evidence including House's pants (apparently in a paper bag) and other clothing (in separate bags). The cardboard box was then carried in the officers' car while they made the 10-hour journey from Tennessee to the FBI lab. Dr. Blake stated that blood vials in hot conditions (such as a car trunk in the summer) could blow

open; and in fact, by the time the blood reached the FBI it had hemolyzed, or spoiled, due to heat exposure. By the time the blood passed from the FBI to a defense expert, roughly a vial and a half were empty, though Agent Bigbee testified he used at most a quarter of one vial. Blood, moreover, had seeped onto one corner of the styrofoam box and onto packing gauze inside the box below the vials.

In addition, although the pants apparently were packaged initially in a paper bag and FBI records suggest they arrived at the FBI in one, the record does not contain the paper bag but does contain a plastic bag with a label listing the pants and Agent Scott's name—and the plastic bag has blood on it. The blood appears in a forked streak roughly five inches long and two inches wide running down the bag's outside front. Though testing by House's expert confirmed the stain was blood, the expert could not determine the blood's source. Speculations about when and how the blood got there add to the confusion regarding the origins of the stains on House's pants.

Faced with these indications of, at best, poor evidence control, the State attempted to establish at the habeas hearing that all blood spillage occurred after Agent Bigbee examined the pants. Were that the case, of course, then blood would have been detected on the pants before any spill—which would tend to undermine Dr. Blake's analysis and support using the bloodstains to infer House's guilt. In support of this theory the State put on testimony by a blood spatter expert who believed the "majority" of the stains were "transfer stains," that is, stains resulting from "wip[ing] across the surface of the pants" rather than seeping or spillage. App. 293–294. Regarding the spillage in the styrofoam box, the expert noted that yellow "Tennessee Crime Laboratory" tape running around the box and down all four sides did not line up when the bloodstains on the box's corner were aligned. The inference was that the FBI received the box from Tennessee authorities, opened it,

and resealed it before the spillage occurred. Reinforcing this theory, Agent Bigbee testified that he observed no blood spillage in the styrofoam box and that had he detected such signs of evidence contamination, FBI policy would have required immediate return of the evidence.

In response House argued that even assuming the tape alignment showed spillage occurring after FBI testing, spillage on one or more earlier occasions was likely. In fact even the State's spatter expert declined to suggest the blood in the box and on the packing gauze accounted for the full vial and a quarter missing. And when the defense expert opened the box and discovered the spills, the bulk of the blood-caked gauze was located around and underneath the half-full vial, which was also located near the stained corner. No gauze immediately surrounding the completely empty vial was stained. The tape, moreover, circled the box in two layers, one underneath the other, and in one spot the underlying layer stops cleanly at the lid's edge, as if cut with a razor, and does not continue onto the body of the box below. In House's view this clean cut suggests the double layers could not have resulted simply from wrapping the tape around twice, as the spatter expert claimed; rather, someone possessing Tennessee Crime Lab tape—perhaps the officers transporting the blood and pants—must have cut the box open and resealed it, possibly creating an opportunity for spillage. Supporting the same inference, a label on the box's lid lists both blood and vaginal secretions as the box's contents, though Agent Bigbee's records show the vaginal fluids arrived at the FBI in a separate envelope. Finally, cross-examination revealed that Agent Bigbee's practice did not always match the letter of FBI policy. Although Mrs. Muncey's bra and housecoat were packed together in a single bag, creating, according to Agent Bigbee, a risk of "cross contamination," *id.*, at 286, he did not return them; nor did he note the discrepancy between the "[b]lood and

[v]aginal secretions" label and the styrofoam box's actual contents, though he insisted his customary practice was to match labels with contents immediately upon opening an evidence box. *Id.*, at 287.

The State challenged Dr. Blake's scientific conclusions, and to do so it called Agent Bigbee as a witness. Agent Bigbee defended the testimony he had given at the trial. To begin with, he suggested Dr. Blake had misconstrued the term "inc" in Agent Bigbee's trial report, interpreting it to mean "incomplete" when it in fact meant "inconclusive." *Id.*, at 254–256, 282. Dr. Blake, however, replied "[s]ame difference" when asked whether his opinion would change if "inc" meant "inconclusive." *Id.*, at 256; see also 6 Tr. 906 (Bigbee trial testimony) ("You will notice I have INC written under the transparent, that is the symbol that I use to mean the test was incomplete"). Agent Bigbee further asserted that, whereas Dr. Blake (in Bigbee's view) construed the results to mean the enzyme was not present at all, in fact the results indicated only that Bigbee could not identify the marker type on whatever enzymes were present. App. 282. Yet the State did not cross-examine Dr. Blake on this point, nor did the District Court resolve the dispute one way or the other, so on this record it seems possible that Dr. Blake meant only to suggest the blood was too degraded to permit conclusive typing. The State, moreover, does not ask us to question Dr. Blake's basic premise about the durability of blood chemicals deposited on cotton—a premise Agent Bigbee appeared to accept as a general matter. Given the record as it stands, then, we cannot say Dr. Blake's conclusions have been discredited; if other objections might be adduced, they must await further proceedings. At the least, the record before us contains credible testimony suggesting that the missing enzyme markers are generally better preserved on cloth than in poorly kept test tubes, and that principle could support House's spillage theory for the

blood's origin.

In this Court, as a further attack on House's showing, the State suggests that, given the spatter expert's testimony, House's theory would require a jury to surmise that Tennessee officials donned the pants and deliberately spread blood over them. We disagree. This should be a matter for the trier of fact to consider in the first instance, but we can note a line of argument that could refute the State's position. It is correct that the State's spatter expert opined that the stains resulted from wiping or smearing rather than direct spillage; and she further stated that the distribution of stains in some spots suggests the pants were "folded in some manner or creased in some manner" when the transfers occurred, *id.*, at 296. While the expert described this pattern, at least with respect to stains on the lap of the pants, as "consistent" with the pants being worn at the time of the staining, *ibid.*, her testimony, as we understand it, does not refute the hypothesis that the packaging of the pants for transport was what caused them to be folded or creased. It seems permissible, moreover, to conclude that the small size and wide distribution of stains—inside the right pocket, outside that pocket, near the inside button, on the left thigh and outside leg, on the seat of the pants, and on the right bottom cuff, including inside the pants—fits as well with spillage in transport as with wiping and smearing from bloody objects at the crime scene, as the State proposes. (As has been noted, no blood was found on House's shoes.)

The District Court discounted Dr. Blake's opinion, not on account of Blake's substantive approach, but based on testimony from Agent Scott indicating he saw, as the District Court put it, "what appeared to be bloodstains on Mr. House's blue jeans when the jeans were removed from the laundry hamper at Ms. Turner's trailer." *Id.*, at 348. This inference seems at least open to question, however. Agent Scott stated only that he "saw reddish brownish

stains [he] suspected to be blood"; he admitted that he "didn't thoroughly examine the blue jeans at that time." R276:113–114. The pants were in fact extensively soiled with mud and reddish stains, only small portions of which are blood.

In sum, considering "'all the evidence,'" *Schlup*, 513 U. S., at 328 (quoting Friendly, 38 U. Chi. L. Rev., at 160), on this issue, we think the evidentiary disarray surrounding the blood, taken together with Dr. Blake's testimony and the limited rebuttal of it in the present record, would prevent reasonable jurors from placing significant reliance on the blood evidence. We now know, though the trial jury did not, that an Assistant Chief Medical Examiner believes the blood on House's jeans must have come from autopsy samples; that a vial and a quarter of autopsy blood is unaccounted for; that the blood was transported to the FBI together with the pants in conditions that could have caused vials to spill; that the blood did indeed spill at least once during its journey from Tennessee authorities through FBI hands to a defense expert; that the pants were stored in a plastic bag bearing both a large blood stain and a label with TBI Agent Scott's name; and that the styrofoam box containing the blood samples may well have been opened before it arrived at the FBI lab. Thus, whereas the bloodstains, emphasized by the prosecution, seemed strong evidence of House's guilt at trial, the record now raises substantial questions about the blood's origin.

A Different Suspect

Were House's challenge to the State's case limited to the questions he has raised about the blood and semen, the other evidence favoring the prosecution might well suffice to bar relief. There is, however, more; for in the post-trial proceedings House presented troubling evidence that Mr. Muncey, the victim's husband, himself could have been the murderer.

At trial, as has been noted, the jury heard that roughly two weeks before the murder Mrs. Muncey's brother received a frightened phone call from his sister indicating that she and Mr. Muncey had been fighting, that she was scared, and that she wanted to leave him. The jury also learned that the brother once saw Mr. Muncey "smac[k]" the victim. 7 Tr. 1087–1088. House now has produced evidence from multiple sources suggesting that Mr. Muncey regularly abused his wife. For example, one witness—Kathy Parker, a lifelong area resident who denied any animosity towards Mr. Muncey—recalled that Mrs. Muncey "was constantly with black eyes and busted mouth." App. 235. In addition Hazel Miller, who is Kathy Parker's mother and a lifelong acquaintance of Mr. Muncey, testified at the habeas hearing that two or three months before the victim's death Mr. Muncey came to Miller's home and "tried to get my daughter [Parker] to go out with him," R274:47. (Parker had dated Mr. Muncey at age 14.) According to Miller, Muncey said "[h]e was upset with his wife, that they had had an argument and he said he was going to get rid of that woman one way or the other." App. 236.

Another witness—Mary Atkins, also an area native who "grew up" with Mr. Muncey and professed no hard feelings, R274:10, 16—claims she saw Mr. Muncey "backhan[d]" Mrs. Muncey on the very night of the murder. App. 226, 228. Atkins recalled that during a break in the recreation center dance, she saw Mr. Muncey and his wife arguing in the parking lot. Mr. Muncey "grabbed her and he just backhanded her." *Id.*, at 228. After that, Mrs. Muncey "left walking." *Id.*, at 229. There was also testimony from Atkins' mother, named Artie Lawson. A self-described "good friend" of Mr. Muncey, *id.*, at 231, Lawson said Mr. Muncey visited her the morning after the murder, before the body was found. According to Lawson, Mr. Muncey asked her to tell anyone who inquired not only

that she had been at the dance the evening before and had seen him, but also that he had breakfasted at her home at 6 o'clock that morning. Lawson had not in fact been at the dance, nor had Mr. Muncey been with her so early.

Of most importance is the testimony of Kathy Parker and her sister Penny Letner. They testified at the habeas hearing that, around the time of House's trial, Mr. Muncey had confessed to the crime. Parker recalled that she and "some family members and some friends [were] sitting around drinking" at Parker's trailer when Mr. Muncey "just walked in and sit down." R274:37. Muncey, who had evidently been drinking heavily, began "rambling off . . . [t]alking about what happened to his wife and how it happened and he didn't mean to do it." *Ibid.* According to Parker, Mr. Muncey "said they had been into [an] argument and he slapped her and she fell and hit her head and it killed her and he didn't mean for it to happen." *Id.*, at 38. Parker said she "freaked out and run him off." *Ibid.*

Letner similarly recalled that at some point either "during [House's] trial or just before," *id.*, at 30, Mr. Muncey intruded on a gathering at Parker's home. Appearing "pretty well blistered," Muncey "went to crying and was talking about his wife and her death and he was saying that he didn't mean to do it." App. 232. "[D]idn't mean to do what[?]," Letner asked, R274:33, at which point Mr. Muncey explained:

> "[S]he was 'bitching him out' because he didn't take her fishing that night, that he went to the dance instead. He said when he come home that she was still on him pretty heavily 'bitching him out' again and that he smacked her and that she fell and hit her head. He said I didn't mean to do it, but I had to get rid of her, because I didn't want to be charged with murder." App. 232–233.

Letner, who was then 19 years old with a small child,

said Mr. Muncey's statement "scared [her] quite badly," so she "got out of there immediately." *Id.*, at 233. Asked whether she reported the incident to the authorities, Letner stated, "I was frightened, you know. . . . I figured me being 19 year old they wouldn't listen to anything I had to say." R274:31. Parker, on the other hand, claimed she (Parker) in fact went to the Sherriff's Department, but no one would listen:

> "I tried to speak to the Sheriff but he was real busy. He sent me to a deputy. The deputy told me to go upstairs to the courtroom and talk to this guy, I can't remember his name. I never did really get to talk to anybody." App. 234.

Parker said she did not discuss the matter further because "[t]hey had it all signed, sealed and delivered. We didn't know anything to do until we heard that they reopened [House's] trial." R274:45. Parker's mother, Hazel Miller, confirmed she had driven Parker to the courthouse, where Parker "went to talk to some of the people about this case." App. 237.

Other testimony suggests Mr. Muncey had the opportunity to commit the crime. According to Dennis Wallace, a local law enforcement official who provided security at the dance on the night of the murder, Mr. Muncey left the dance "around 10:00, 10:30, 9:30 to 10:30." R274:56–57. Although Mr. Muncey told law enforcement officials just after the murder that he left the dance only briefly and returned, Wallace could not recall seeing him back there again. Later that evening, Wallace responded to Mr. Muncey's report that his wife was missing. Muncey denied he and his wife had been "a fussing or a fighting"; he claimed his wife had been "kidnapped." *Id.*, at 58. Wallace did not recall seeing any blood, disarray, or knocked-over furniture, although he admitted he "didn't pay too much attention" to whether the floor appeared especially

clean. According to Wallace, Mr. Muncey said "let's search for her" and then led Wallace out to search "in the weeds" around the home and the driveway (not out on the road where the body was found). *Id.*, at 58, 60, 63.

In the habeas proceedings, then, two different witnesses (Parker and Letner) described a confession by Mr. Muncey; two more (Atkins and Lawson) described suspicious behavior (a fight and an attempt to construct a false alibi) around the time of the crime; and still other witnesses described a history of abuse.

As to Parker and Letner, the District Court noted that it was "not impressed with the allegations of individuals who wait over ten years to come forward with their evidence," especially considering that "there was no physical evidence in the Munceys' kitchen to corroborate [Mr. Muncey's] alleged confession that he killed [his wife] there." App. 348. Parker and Letner, however, did attempt to explain their delay coming forward, and the record indicates no reason why these two women, both lifelong acquaintances of Mr. Muncey, would have wanted either to frame him or to help House. Furthermore, the record includes at least some independent support for the statements Parker and Letner attributed to Mr. Muncey. The supposed explanation for the fatal fight—that his wife was complaining about going fishing—fits with Mrs. Muncey's statement to Luttrell earlier that evening that her husband's absence was "all right, because she was going to make him take her fishing the next day," *id.*, at 11–12. And Dr. Blake testified, in only partial contradiction of Dr. Carabia, that Mrs. Muncey's head injury resulted from "a surface with an edge" or "a hard surface with a corner," not from a fist. R275:72. (Dr. Carabia had said either a fist or some other object could have been the cause.)

Mr. Muncey testified at the habeas hearing, and the District Court did not question his credibility. Though Mr.

Muncey said he seemed to remember visiting Lawson the day after the murder, he denied either killing his wife or confessing to doing so. Yet Mr. Muncey also claimed, contrary to Constable Wallace's testimony and to his own prior statement, that he left the dance on the night of the crime only when it ended at midnight. Mr. Muncey, moreover, denied ever hitting Mrs. Muncey; the State itself had to impeach him with a prior statement on this point.

It bears emphasis, finally, that Parker's and Letner's testimony is not comparable to the sort of eleventh-hour affidavit vouching for a defendant and incriminating a conveniently absent suspect that Justice O'Connor described in her concurring opinion in *Herrera* as "unfortunate" and "not uncommon" in capital cases, 506 U. S., at 423; nor was the confession Parker and Letner described induced under pressure of interrogation. The confession evidence here involves an alleged spontaneous statement recounted by two eyewitnesses with no evident motive to lie. For this reason it has more probative value than, for example, incriminating testimony from inmates, suspects, or friends or relations of the accused.

The evidence pointing to Mr. Muncey is by no means conclusive. If considered in isolation, a reasonable jury might well disregard it. In combination, however, with the challenges to the blood evidence and the lack of motive with respect to House, the evidence pointing to Mr. Muncey likely would reinforce other doubts as to House's guilt.

Other Evidence

Certain other details were presented at the habeas hearing. First, Dr. Blake, in addition to testifying about the blood evidence and the victim's head injury, examined photographs of House's bruises and scratches and concluded, based on 35 years' experience monitoring the development and healing of bruises, that they were too old to have resulted from the crime. In addition Dr. Blake

claimed that the injury on House's right knuckle was indicative of "[g]etting mashed"; it was not consistent with striking someone. R275:63. (That of course would also eliminate the explanation that the injury came from the blow House supposedly told Turner he gave to his unidentified assailant.)

The victim's daughter, Lora Muncey (now Lora Tharp), also testified at the habeas hearing. She repeated her recollection of hearing a man with a deep voice like her grandfather's and a statement that her father had had a wreck down by the creek. She also denied seeing any signs of struggle or hearing a fight between her parents, though she also said she could not recall her parents ever fighting physically. The District Court found her credible, and this testimony certainly cuts in favor of the State.

Finally, House himself testified at the habeas proceedings. He essentially repeated the story he allegedly told Turner about getting attacked on the road. The District Court found, however, based on House's demeanor, that he "was not a credible witness." App. 329.

Conclusion

This is not a case of conclusive exoneration. Some aspects of the State's evidence—Lora Muncey's memory of a deep voice, House's bizarre evening walk, his lie to law enforcement, his appearance near the body, and the blood on his pants—still support an inference of guilt. Yet the central forensic proof connecting House to the crime—the blood and the semen—has been called into question, and House has put forward substantial evidence pointing to a different suspect. Accordingly, and although the issue is close, we conclude that this is the rare case where—had the jury heard all the conflicting testimony—it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt.

V

In addition to his gateway claim under *Schlup*, House argues that he has shown freestanding innocence and that as a result his imprisonment and planned execution are unconstitutional. In *Herrera*, decided three years before *Schlup*, the Court assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." 506 U. S., at 417; see also *id.*, at 419 (O'Connor, J., concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution"). "[T]he threshold showing for such an assumed right would necessarily be extraordinarily high," the Court explained, and petitioner's evidence there fell "far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo*, to exist." *Id.*, at 417, 418–419; see also *id.*, at 427 (O'Connor, J., concurring) (noting that because "[p]etitioner has failed to make a persuasive showing of actual innocence," "the Court has no reason to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence"). House urges the Court to answer the question left open in *Herrera* and hold not only that freestanding innocence claims are possible but also that he has established one.

We decline to resolve this issue. We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it. To be sure, House has cast considerable doubt on his guilt—doubt sufficient to satisfy *Schlup*'s gateway standard for obtaining federal review despite a state procedural default. In *Herrera*, however, the Court described the threshold for any hypothetical

freestanding innocence claim as "extraordinarily high." 506 U. S., at 417. The sequence of the Court's decisions in *Herrera* and *Schlup*—first leaving unresolved the status of freestanding claims and then establishing the gateway standard—implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup*. It follows, given the closeness of the *Schlup* question here, that House's showing falls short of the threshold implied in *Herrera*.

* * *

House has satisfied the gateway standard set forth in *Schlup* and may proceed on remand with procedurally defaulted constitutional claims. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 04–8990

PAUL GREGORY HOUSE, PETITIONER *v.* RICKY BELL, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 12, 2006]

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring in the judgment in part and dissenting in part.

To overcome the procedural hurdle that Paul House created by failing to properly present his constitutional claims to a Tennessee court, he must demonstrate that the constitutional violations he alleges "ha[ve] probably resulted in the conviction of one who is actually innocent," such that a federal court's refusal to hear the defaulted claims would be a "miscarriage of justice." *Schlup* v. *Delo*, 513 U. S. 298, 326, 327 (1995) (internal quotation marks omitted). To make the requisite showing of actual innocence, House must produce "new *reliable* evidence" and "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.*, at 324, 327 (emphasis added). The question is not whether House was prejudiced at his trial because the jurors were not aware of the new evidence, but whether all the evidence, considered together, proves that House was actually innocent, so that no reasonable juror would vote to convict him. Considering all the evidence, and giving due regard to the District Court's findings on whether House's new evidence was reliable, I do not find it probable that no reasonable juror would vote to convict him, and accordingly I dissent.

Because I do not think that House has satisfied the actual innocence standard set forth in *Schlup*, I do not believe that he has met the higher threshold for a freestanding innocence claim, assuming such a claim exists. See *Herrera* v. *Collins*, 506 U. S. 390, 417 (1993). I therefore concur in the judgment with respect to the Court's disposition of that separate claim.

I

In *Schlup*, we stated that a habeas petitioner attempting to present a defaulted claim to a federal court must present "new *reliable* evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." 513 U. S., at 324 (emphasis added). Implicit in the requirement that a habeas petitioner present reliable evidence is the expectation that a factfinder will assess reliability. The new evidence at issue in *Schlup* had not been subjected to such an assessment—the claim in *Schlup* was for an evidentiary hearing—and this Court specifically recognized that the "new statements may, of course, be unreliable." *Id.*, at 331. The Court stated that the District Court, as the "reviewing tribunal," was tasked with assessing the "probative force" of the petitioner's new evidence of innocence, and "may have to make some credibility assessments." *Id.*, at 327–328, 330. Indeed, the Supreme Court took the unusual step of remanding the case to the Court of Appeals "with instructions to remand to the District Court," so that the District Court could consider how the "likely credibility of the affiants" bears upon the "probable reliability" of the new evidence. *Id.*, at 332. In short, the new evidence is not simply taken at face value; its reliability has to be tested.

Critical to the Court's conclusion here that House has sufficiently demonstrated his innocence are three pieces of new evidence presented to the District Court: DNA evi-

dence showing that the semen on Carolyn Muncey's clothing was from her husband, Hubert Muncey, not from House; testimony from new witnesses implicating Mr. Muncey in the murder; and evidence indicating that Mrs. Muncey's blood spilled from test tubes containing autopsy samples in an evidence container. To determine whether it should open its door to House's defaulted constitutional claims, the District Court considered this evidence in a comprehensive evidentiary hearing. As House presented his new evidence, and as the State rebutted it, the District Court observed the witnesses' demeanor, examined physical evidence, and made findings about whether House's new evidence was in fact reliable. This factfinding role is familiar to a district court. "The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Anderson* v. *Bessemer City*, 470 U. S. 564, 574 (1985).

The State did not contest House's new DNA evidence excluding him as the source of the semen on Mrs. Muncey's clothing, but it strongly contested the new testimony implicating Mr. Muncey, and it insisted that the blood spillage occurred *after* the FBI tested House's jeans and determined that they were stained with Mrs. Muncey's blood.

At the evidentiary hearing, sisters Kathy Parker and Penny Letner testified that 14 years earlier, either during or around the time of House's trial, they heard Mr. Muncey drunkenly confess to having accidentally killed his wife when he struck her in their home during an argument, causing her to fall and hit her head. Record, Doc. 274, pp. 28–29, 30, 37–38. *Schlup* provided guidance on how a district court should assess this type of new evidence: The court "may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence," and it "must assess the probative force of the newly presented evidence

in connection with the evidence of guilt adduced at trial." 513 U. S., at 332. Consistent with this guidance, the District Court concluded that the sisters' testimony was not credible. The court noted that it was "not impressed with the allegations of individuals who wait over ten years to come forward." App. 348. It also considered how the new testimony fit within the larger web of evidence, observing that Mr. Muncey's alleged confession contradicted the testimony of the Munceys' "very credible" daughter, Lora Tharp, who consistently testified that she did not hear a fight in the house that night, but instead heard a man with a deep voice who lured her mother from the house by saying that Mr. Muncey had been in a wreck near the creek. *Id.*, at 323, 348.

The District Court engaged in a similar reliability inquiry with regard to House's new evidence of blood spillage. At the evidentiary hearing, House conceded that FBI testing showed that his jeans were stained with Mrs. Muncey's blood, but he set out to prove that the blood spilled from test tubes containing autopsy samples, and that it did so before the jeans were tested by the FBI. The District Court summarized the testimony of the various witnesses who handled the evidence and their recollections about bloodstains and spillage; it acknowledged that House's expert, Dr. Cleland Blake, disagreed with FBI Agent Paul Bigbee about how to interpret the results of Agent Bigbee's genetic marker analysis summary; and it summarized the testimony of the State's blood spatter expert, Paulette Sutton. *Id.*, at 339–347. After reviewing all the evidence, the District Court stated: "Based upon the evidence introduced during the evidentiary hearing . . . the court concludes that the spillage occurred *after* the FBI crime laboratory received and tested the evidence." *Id.*, at 348 (emphasis added).

Normally, an appellate court reviews a district court's factual findings only for clear error. See Fed. Rule Civ.

Proc. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses"); *Bessemer City, supra*, at 574 (clearly erroneous standard applies "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts"). The Sixth Circuit deferred to the District Court's factual findings, 386 F. 3d 668, 684 (2004), and *Schlup* did not purport to alter—but instead reaffirmed and highlighted—the district court's critical role as fact-finder. Yet the majority asserts that the clear error standard "overstates the effect of the District Court's ruling," and then dismisses the District Court's reliability findings because it is "uncertain about" them, while stopping short of identifying clear error. *Ante*, at 20. This is a sharp departure from the guidance in *Schlup*.

In *Schlup*, we contrasted a district court's role in assessing the reliability of new evidence of innocence with a district court's role in deciding a summary judgment motion. 513 U. S., at 332. We explained that, in the latter situation, the district court does not assess credibility or weigh the evidence, but simply determines whether there is a genuine factual issue for trial. *Ibid.* Assessing the reliability of new evidence, on the other hand, is a typical factfinding role, requiring credibility determinations and a weighing of the "probative force" of the new evidence in light of "the evidence of guilt adduced at trial." *Ibid.* We found it "obviou[s]" that a habeas court conducting an actual innocence inquiry must do more than simply check whether there are genuine factual issues for trial. *Ibid.* The point of the actual innocence inquiry is for the federal habeas court to satisfy itself that it should suspend the normal procedural default rule, disregard the important judicial interests of finality and comity, and allow a state

prisoner to present his defaulted constitutional claims to a federal court. See *McCleskey* v. *Zant*, 499 U. S. 467, 490–491 (1991).

The majority surprisingly states that this guidance is inapplicable here because this case involves a "fully developed record," while the district court in *Schlup* had declined to conduct an evidentiary hearing. *Ante*, at 17–18. But the guidance is clearly applicable: The point in *Schlup* was not simply that a hearing was required, but why—because the district court had to assess the probative force of the petitioner's newly presented evidence, by engaging in factfinding rather than performing a summary judgment-type inquiry. 513 U. S., at 331–332. That is precisely what the District Court did here. In addition to a "fully developed record," we have the District Court's factual findings about the reliability of the new evidence in that record, factual findings which the majority disregards without finding clear error.

The majority essentially disregards the District Court's role in assessing the reliability of House's new evidence. With regard to the sisters' testimony, the majority casts aside the District Court's determination that their statements came too late and were too inconsistent with credible record evidence to be reliable, instead observing that the women had no obvious reason to lie, that a few aspects of their testimony have record support, and that they recounted an uncoerced confession. *Ante*, at 32–33. As for the District Court's express finding that the autopsy blood spilled after the FBI tested House's jeans, the majority points to Dr. Blake's testimony that blood enzymes "are generally better preserved on cloth," and even conjures up its own theory in an attempt to refute Ms. Sutton's expert testimony that the pattern of some bloodstains was consistent with blood being transferred while the pants were being worn. *Ante*, at 27 ("This should be a matter for the trier of fact to consider in the first instance, but we can

note a line of argument that could refute the State's position . . . [Ms. Sutton's] testimony . . . does not refute the hypothesis that the packaging of the pants for transport was what caused them to be folded or creased"); see App. 296.

The majority's assessment of House's new evidence is precisely the summary judgment-type inquiry *Schlup* said was inappropriate. 513 U. S., at 332. By casting aside the District Court's factual determinations made after a comprehensive evidentiary hearing, the majority has done little more than reiterate the factual disputes presented below. Witnesses do not testify in our courtroom, and it is not our role to make credibility findings and construct theories of the possible ways in which Mrs. Muncey's blood could have been spattered and wiped on House's jeans. The District Court did not painstakingly conduct an evidentiary hearing to compile a record for us to sort through transcript by transcript and photograph by photograph, assessing for ourselves the reliability of what we see. *Schlup* made abundantly clear that reliability determinations were essential, but were for the district court to make. 513 U. S., at 331–332. We are to defer to the better situated District Court on reliability, unless we determine that its findings are clearly erroneous. We are not concerned with "the district court's independent judgment as to whether reasonable doubt exists," *id.*, at 329, but the District Court here made basic factual findings about the reliability of House's new evidence; it did not offer its personal opinion about whether it doubted House's guilt. *Schlup* makes clear that those findings are controlling unless clearly erroneous.

I have found no clear error in the District Court's reliability findings. Not having observed Ms. Parker and Ms. Letner testify, I would defer to the District Court's determination that they are not credible, and the evidence in the record undermining the tale of an accidental killing

during a fight in the Muncey home convinces me that this credibility finding is not clearly erroneous. Dr. Alex Carabia, who performed the autopsy, testified to injuries far more severe than a bump on the head: Mrs. Muncey had bruises on the front and back of her neck, on both thighs, on her lower right leg and left knee, and her hands were bloodstained up to the wrists; her injuries were consistent with a struggle and traumatic strangulation. Record, Addendum 4, 7 Tr. of Evidence in No. 378 (Crim. Ct. Union County, Tenn.) 984–987 (hereinafter Tr.) And, of course, Lora Tharp has consistently recalled a deep-voiced visitor arriving late at night to tell Mrs. Muncey that her husband was in a wreck near the creek. App. 19, 270.

I also find abundant evidence in the record to support the District Court's finding that blood spilled within the evidence container after the FBI received and tested House's jeans. Agent Bigbee testified that there was no leakage in the items submitted to him for testing. *Id.*, at 277. The majority's entire analysis on this point assumes the agent flatly lied, though there was no attack on his credibility below. Moreover, Ms. Sutton determined, in her expert opinion, that the wide distribution of stains "front and back, top to bottom," the fact that some bloodstains were mixed with mud, and the presence of bloodstains inside the pocket and inside the fly, showed that the blood was spattered and wiped—not spilled—on House's jeans. *Id.*, at 291–293, 295; *id.*, at 293 ("[I]f a tube of blood had spilled on these pants, the stain should have been in a localized area"); *id.*, at 294 ("The stains also . . . either originate on the inside and don't soak out or on the outside and are not soaking to the inside. That, of course, would be what you would see with a spill").

It is also worth noting that the blood evidently spilled inside the evidence container when the jeans were protected inside a plastic zip lock bag, as shown by the presence of a bloodstain on the outside of that bag. See Re-

cord, Plt. Exh. 10–6. House's expert tested the exterior and interior of that plastic bag for bloodstains using an "extremely sensitive" test, and only the exterior of the bag tested positive for blood. *Id.*, Doc. 274, at 95–96. The evidence in the record indicates that the jeans were placed in the plastic bag *after* they arrived at the FBI: FBI records show that the jeans arrived there in a *paper* bag, and the plastic bag has FBI markings on it. *Id.*, Addendum 2, Trial Exh. 31, p. 36; *id.*, Plt. Exh. 10–6. The bloodstain on the outside of the *plastic* bag therefore further supports the District Court's conclusion that the blood spilled *after* the evidence was received and tested by the FBI, and not en route when the jeans were in a paper bag. I suppose it is theoretically possible that the jeans were contaminated by spillage before arriving at the FBI, that Agent Bigbee either failed to note or lied about such spillage, and that the FBI then transferred the jeans into a plastic bag and put them back inside the evidence container with the spilled blood still sloshing around sufficiently to contaminate the outside of the plastic bag as extensively as it did. This sort of unbridled speculation can theoretically defeat any inconvenient fact, but does not suffice to convince me that the District Court's factual finding—that the blood spilled *after* FBI testing—was clearly erroneous.

Moreover, the yellow "Tennessee Crime Lab" tape placed around the container on all four sides does not line up when the bloodstained corners of the container and its lid are aligned, showing that the blood did not spill until sometime after the container was received and opened at its first destination—the FBI. See *id.*, Respondent's Exh. 24; *id.*, Doc. 276, pp. 190–191 (testimony of Paulette Sutton). The majority points out that on one side of the container, the first of two layers of tape appears to begin cleanly at the lid's edge, and from this concludes that the container must have been cut open and resealed by Ten-

nessee authorities en route to the FBI. *Ante*, at 25; see Record, Respondent's Exh. 23d. Even if the majority's deduction from a photograph of the container were true, it would show only that Tennessee authorities had reason to open the container once it was sealed to take something out or put something in, perhaps back at the crime lab in Union County. But even if the container had been opened before its arrival at the FBI, the majority recognizes that it was resealed with "Tennessee Crime Lab" tape, and the second layer of tape aligns only when the bloodstains on the container and its lid do not. *Ante*, at 24–25. Of course, the District Court—which concluded that the blood was spilled *after* testing at the FBI laboratory—had before it the box itself with the tape as the witnesses testified on the point, and not—like this Court—simply a photograph. See *Bessemer City*, 470 U. S., at 574 (district court's findings about physical evidence are reviewed for clear error).

House's theory that the blood on his jeans was transferred there from the autopsy samples is based on Dr. Blake's reading of Agent Bigbee's enzyme marker analysis summary. After reading the summary, Dr. Blake concluded that the enzymes in the bloodstains on House's jeans and the enzymes in the autopsy samples had deteriorated to the same extent. Record, Doc. 275, p. 110. In particular, he noted that the GLO1 enzyme showed "incomplete penetration" on both the autopsy blood and the jeans, and because enzymes are better preserved on cloth, the enzyme should have been present on the jeans. *Id.*, at 116. But Agent Bigbee disputed Dr. Blake's reading of what was, after all, Agent Bigbee's own study. He testified that "'inc'" on his chart meant "inconclusive," not "incomplete penetration," and that the term "inconclusive" meant that the enzyme was present, but could not be grouped into an ABO bloodtype. *Id.*, Doc. 276, at 140. While pointing out that his summary showed different levels of enzymes in the two samples, Agent Bigbee also

noted that many different factors—such as heat, dirt, or bacteria in a clothes hamper—could cause enzymes to degrade on cloth. *Id.*, at 139, 167–170. Considering how House's new blood spillage evidence fits within the record as a whole, I can see no clear error in the District Court's express finding that the blood spilled in the evidence container *after* the FBI found Mrs. Muncey's blood on House's jeans.

The District Court attentively presided over a complex evidentiary hearing, often questioning witnesses extensively during the presentation of critical evidence. See, *e.g.*, *id.*, Doc. 275, at 110–115. The court concisely summarized the evidence presented, then dutifully made findings about the reliability of the testimony it heard and the evidence it observed. We are poorly equipped to second-guess the District Court's reliability findings and should defer to them, consistent with the guidance we provided in *Schlup*.

II

With due regard to the District Court's reliability findings, this case invites a straightforward application of the legal standard adopted in *Schlup*. A petitioner does not pass through the *Schlup* gateway if it is "more likely than not that there is *any* juror who, acting reasonably, would have found the petitioner guilty beyond a reasonable doubt." 513 U. S., at 333 (O'Connor, J., concurring) (emphasis added).

The majority states that if House had presented just one of his three key pieces of evidence—or even two of the three—he would not pass through the *Schlup* gateway. See *ante*, at 28 ("Were House's challenge to the State's case limited to the questions he has raised about the blood and semen, the other evidence favoring the prosecution might well suffice to bar relief"); *ante*, at 33 ("If considered in isolation, a reasonable jury might well disregard [the

evidence pointing to Mr. Muncey]. In combination, however, with the challenges to the blood evidence and the lack of motive with respect to House, the evidence pointing to Mr. Muncey likely would reinforce other doubts as to House's guilt"). According to the majority, House has picked the trifecta of evidence that places conviction outside the realm of choices *any* juror, acting reasonably, would make. Because the case against House remains substantially unaltered from the case presented to the jury, I disagree.

At trial, the State presented its story about what happened on the night of Mrs. Muncey's murder. The Munceys' daughter heard a deep-voiced perpetrator arrive at the Muncey home late at night and tell Mrs. Muncey that her husband had been in a wreck near the creek. App. 19. Ms. Tharp relayed her testimony again at the evidentiary hearing, and the District Court determined that she was a "very credible witness." *Id.*, at 270, 323.

When police questioned House after witnesses reported seeing him emerge from the embankment near Mrs. Muncey's body shortly before it was discovered, he told two different officers that he never left Donna Turner's trailer the previous evening, even recounting the series of television programs he watched before going to bed. 7 Tr. 963–965, 1031–1032. He had worked to concoct an alibi we now know was a lie. On the day Mrs. Muncey's body was found, Bill Breeding, a criminal investigator at the Union County Sheriff's Office, observed House at the local jail and noticed that he had abrasions "across his knuckles and about his hands," two or three bruises on his right arm, scratches on his chest, and his right ring finger was red and swollen. 6 *id.*, at 801–802. The interviewing officers noticed similar injuries. App. 78–80; 7 Tr. 974–975. House told them that his finger was swollen because he fell off a porch, and the scratches and bruises were from tearing down a building, and from a cat. *Ibid.* Ms.

Turner initially confirmed House's alibi, but she changed her story when police warned her that covering up a homicide was a serious offense. *Id.*, at 1063. Ms. Turner then told police that House had in fact left her house that night between 10:30 and 10:45 p.m. *Id.*, at 1062–1063. He came back some time later panting and sweating, shirtless and shoeless, and with various injuries. App. 88–91; 8 Tr. 1154–1155.

Also on the day the body was found, Sheriff Earl Loy asked House if he was wearing the same clothes he wore the night before. 6 *id.*, at 845. House "hesitated," then stated that he had changed his shirt, *but not his jeans*. *Ibid.* In other words, he specifically tried to conceal from the police that he had worn other jeans the night before, for reasons that were to become clear. Ms. Turner revealed that House's statement that he had not changed his jeans was a lie, and police retrieved House's dirty jeans from Ms. Turner's hamper. *Ibid.* Of course, FBI testing revealed that House's jeans were stained with Mrs. Muncey's blood, and the District Court determined that House's new evidence of blood spillage did not undermine those test results. App. 348. If in fact Mrs. Muncey's blood only got on House's jeans from later evidentiary spillage, House would have had no reason to lie to try to keep the existence of the concealed jeans from the police.

Through Ms. Turner's testimony at trial, the jury also heard House's story about what happened that night. He left Ms. Turner's trailer late at night to go for a walk. *Id.*, at 86. When he returned some time later—panting, sweating, and missing his shirt and shoes—he told her that some men in a truck tried to kill him. *Id.*, at 88–91. When Ms. Turner asked House about his injuries, he attributed them to fighting with his assailants. *Id.*, at 90; 8 Tr. 1154–1155. House retold this story to the District Court, saying that he initially lied to police because he was on parole and did not want to draw attention to him-

self. Record, Doc. 276, at 99, 108–109. In other words, having nothing to hide and facing a murder charge, House lied—and when he was caught in the lie, he said he lied not to escape the murder charge, but solely to avoid unexplained difficulties with his parole officer. The jury rejected House's story about the night's events, and the District Court "considered Mr. House's demeanor and found that he was not a credible witness." App. 329.

The jury also heard House's attempt to implicate Mr. Muncey in his wife's murder by calling Mrs. Muncey's brother, Ricky Green, as a witness. Mr. Green testified that two weeks before the murder, his sister called him to say that she and Mr. Muncey had been fighting, that she wanted to leave him, and that she was scared. 7 Tr. 1088. Mr. Green also testified that the Munceys had marital problems, and that he had previously seen Mr. Muncey hit his wife. *Id.*, at 1087. The jury rejected House's attempt to implicate Mr. Muncey, and the District Court was not persuaded by House's attempt to supplement this evidence at the evidentiary hearing, finding that his new witnesses were not credible. App. 348.

Noticeably absent from the State's story about what happened to Mrs. Muncey on the night of her death was much mention of the semen found on Mrs. Muncey's clothing. House's single victory at the evidentiary hearing was new DNA evidence proving that the semen was deposited by Mr. Muncey. The majority identifies the semen evidence as "[c]entral to the State's case" against House, *ante*, at 8, but House's jury would probably be quite surprised by this characterization. At trial, Agent Bigbee testified that from the semen stains on Mrs. Muncey's clothing, he could determine that the man who deposited the semen had type A blood, and was a secretor. App. 54–56. Agent Bigbee also testified that House and Mr. Muncey both have type A blood, that House is a secretor, and that "[t]here is an *eighty (80%) percent* chance that [Mr.

Muncey] is a secretor." *Id.*, at 55–56; 6 Tr. 952 (emphasis added). Moreover, Agent Bigbee informed the jury that because 40 percent of people have type A blood, and 80 percent of those people are secretors, the semen on Mrs. Muncey's clothing could have been deposited by roughly one out of every three males. *Id.*, at 957. The jury was also informed several times by the defense that Mrs. Muncey's body was found fully clothed. See, *e.g.*, 4 *id.*, at 628; 9 *id.*, at 1274.

The majority describes House's sexual motive as "a central theme in the State's narrative linking House to the crime," and states that without the semen evidence, "a jury . . . would have found it necessary to establish some different motive, or, if the same motive, an intent far more speculative." *Ante*, at 21. The State, however, consistently directed the jury's attention *away* from motive, and sexual motive was far from a "central theme" of the State's case—presumably because of the highly ambiguous nature of the semen evidence recounted above. The Tennessee Supreme Court did not mention that evidence in cataloging the "[p]articularly incriminating" or "[d]amaging" evidence against House. App. 135. The State did not mention the semen evidence in its opening statement to the jury, instead focusing on premeditation. 4 Tr. 613–615. The defense used its opening statement to expose lack of motive as a weakness in the State's case. *Id.*, at 628. After the State's equivocal presentation of the semen evidence through Agent Bigbee's testimony at trial, the State again made no reference to the semen evidence or to a motive in its closing argument, prompting the defense to again highlight this omission. 9 *id.*, at 1274 ("[W]hy was Carolyn Muncey killed? We don't know. Is it important to have some motive? In your minds? What motive did Paul Gregory House have to go over and kill a woman that he barely knew? Who was still dressed, still clad in her clothes").

In rebuttal, the State disclaimed any responsibility to prove motive, again shifting the jury's focus to premeditation:

> "The law says that if you take another person's life, you beat them, you strangle them, and then you don't succeed, and then you kill them by giving them multiple blows to the head, and one massive blow to the head, and that that causes their brains to crash against the other side of their skull, and caused such severe bleeding inside the skull itself, that you die—that it does not make any difference under God's heaven, what the motive was. That is what the law is. The law is that if motive is shown, it can be considered by the jury as evidence of guilt. But the law is that if you prove that a killing was done, beyond a reasonable doubt, by a person, and that he premeditated it, he planned it, it is not necessary for the jury to conclude why he did it." App. 106.

As a follow-up to this explanation, when the trial was almost over and only in response to the defense's consistent prodding, the State made its first and only reference to a possible motive, followed immediately by another disclaimer:

> "Now, you may have an idea why he did it. The evidence at the scene which seemed to suggest that he was subjecting this lady to some kind of indignity, why would you get a lady out of her house, late at night, in her night clothes, under the trick that her husband has had a wreck down by the creek? . . . Why is it that you choke her? Why is it that you repeatedly beat her? Why is it that she has scrapes all over her body? Well, it is because either you don't want her to tell what indignities you have subjected her to, or she is unwilling and fights against you, against being subjected to those indignities. . . . That is what the evi-

dence at the scene suggests about motive. But motive is not an element of the crime. It is something that you can consider, or ignore. Whatever you prefer. The issue is not motive. The issue is premeditation." *Id.*, at 106–107.

It is on this "obliqu[e]" reference to the semen evidence during the State's closing argument that the majority bases its assertion that House's sexual motive was a "central theme in the State's narrative." *Ante*, at 11, 21. Although it is possible that one or even some jurors might have entertained doubt about House's guilt absent the clearest evidence of motive, I do not find it more likely than not that *every* juror would have done so, and that is the legal standard under *Schlup*. The majority aphoristically states that "[w]hen identity is in question, motive is key." *Ante*, at 21. Not at all. Sometimes, when identity is in question, alibi is key. Here, House came up with one—and it fell apart, later admitted to be fabricated when his girlfriend would not lie to protect him. Scratches from a cat, indeed. Surely a reasonable juror would give the fact that an alibi had been made up and discredited significant weight. People facing a murder charge, who are innocent, do not make up a story out of concern that the truth might somehow disturb their parole officer. And people do not lie to the police about which jeans they were wearing the night of a murder, if they have no reason to believe the jeans would be stained with the blood shed by the victim in her last desperate struggle to live.

In *Schlup*, we made clear that the standard we adopted requires a "stronger showing than that needed to establish prejudice." 513 U. S., at 327. In other words, House must show more than just a "reasonable probability that . . . the factfinder would have had a reasonable doubt respecting guilt." *Strickland* v. *Washington*, 466 U. S. 668, 695 (1984). House must present such compelling evidence of innocence

that it becomes more likely than not that no single juror, acting reasonably, would vote to convict him. *Schlup*, *supra*, at 329. The majority's conclusion is that given the sisters' testimony (if believed), and Dr. Blake's rebutted testimony about how to interpret Agent Bigbee's enzyme marker analysis summary (if accepted), combined with the revelation that the semen on Mrs. Muncey's clothing was deposited by her husband (which the jurors knew was just as likely as the semen having been deposited by House), no reasonable juror would vote to convict House. *Ante*, at 34. Given the District Court's reliability findings about the first two pieces of evidence, the evidence before us now is not substantially different from that considered by House's jury. I therefore find it more likely than not that in light of this new evidence, at least one juror, acting reasonably, would vote to convict House. The evidence as a whole certainly does not establish that House is actually innocent of the crime of murdering Carolyn Muncey, and accordingly I dissent.